

No. 13039

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United States  
Court of Appeals  
for the Ninth Circuit.

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BANK OF AMERICA NATIONAL TRUST AND  
SAVINGS ASSOCIATION, a National Bank-  
ing Association, and EUGENE J. O'RILEY,  
as Trustee in Bankruptcy of the Estate of  
UNITED PRODUCE COMPANY, a Corpo-  
ration, Bankrupt,

Appellants,

vs.

MERCHANDISE NATIONAL BANK OF CHI-  
CAGO, a National Banking Association,

Appellee.

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Transcript of Record  
In Three Volumes  
Volume II  
(Pages 433 to 832)

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Appeals from the United States District Court,  
Northern District of California,  
Southern Division.

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JOSEPH V. COSGROVE

called as a witness in behalf of the plaintiff as an adverse witness, sworn.

The Clerk: Will you state your name to the Court, please?

A. Joseph V. Cosgrove.

Mr. Lasky: The record will show that I am also calling Mr. Cosgrove as an officer of the defendant bank.

The Court: Very well.

Direct Examination

By Mr. Lasky:

Q. Mr. Cosgrove, you are assistant manager of the East Bakersfield branch of the Bank of America, are you not? A. Yes, sir.

Q. Have been since sometime in June, 1948?

A. Yes, sir.

Q. Have been since sometime in June, 1948?

A. Yes, sir.

Q. And do you recall that Mr. Tarr—I will withdraw that for a moment. Who is Mr. Tarr?

A. Mr. Tarr is the operations officer.

Q. Of your branch? A. Yes, sir.

Q. Do you recall that he was on vacation from October 11th to October 18, 1948? [354]

A. Yes, sir.

Q. And that you were helping out on the work that he ordinarily would do during that period?

A. Yes, sir.

Q. And during that time Mr. Tarr was on vaca-

(Testimony of Joseph V. Cosgrove.)

tion, you had something to do with the Lofendo account?      A. Yes, sir.

Q. And during that little period, your attention was attracted by what you considered to be unusual activity in the Lofendo account?      A. Yes, sir.

Q. And this unusual activity consisted of the fact that a large number of checks in large amounts were being both deposited and checked out?

A. Yes, sir.

Q. You learned this because large items were referred to you by the bookkeeper for okay pursuant to practice of your bank branch?

A. Yes, sir.

Q. And on looking—you thereupon looked into the matter personally, did you not?

A. Yes, sir.

Q. And on looking into it, your attention was particularly attracted by the fact that checks drawn on the account were payable to United Produce Company and United Produce Checks were being deposited, [355] and you thought that fact required explanation?      A. Yes, sir.

Q. So that when Mr. Tarr returned from his vacation on October 18th, you told him that you had had occasion to notice the Lofendo account, that there were a lot of checks in large amounts coming in and going out, that they were coming and going from the same parties, United Produce, and you asked Mr. Tarr if he knew anything about it, correct?      A. Yes, sir.

Mr. Erskine: Asked Mr. Tarr——?

Mr. Lasky: If he knew anything about it.

(Testimony of Joseph V. Cosgrove.)

Q. Mr. Tarr said he would investigate, did he not?      A. Yes, sir.

Q. And it was a few days later, then, that Mr. Tarr showed you his memorandum of October 22nd, which has been marked here as Plaintiff's Exhibit 6—no, Plaintiff's Exhibit 12, I am sorry. Is that it (handing to witness)?      A. Yes, sir.

Q. And you initialed it?      A. Yes, sir.

Q. To show your approval of the paper?

A. To show that I had read it.

Q. That you had read it. And then, Mr. Cosgrove, you noticed this memorandum refers to unusual operations between the two subject parties, the unusual operations were the fact that [356] Lofendo's checks were payable in such numbers and amounts to United Produce, and that United was making checks payable to Lofendo in large amounts and numbers. That is correct, is it not?

A. Yes, sir.

Q. And in fact, this fact signified to you that the account warranted further investigation?

A. There was more to it than that. The fact that we were paying some of those checks before those checks which he deposited with United had **a chance to clear.**

Q. Yes, of course. Because in honoring checks drawn by Lofendo to the order of United, your bank was relying upon checks of United to Lofendo. That's right, is it not?      A. Yes, sir.

Q. And that is the sort of thing you thought required further investigation?      A. Yes, sir.

Mr. Erskine: Would you speak just a little

(Testimony of Joseph V. Cosgrove.)

louder, Mr. Cosgrove? It is a little difficult for me to get everything you say.

Q. (By Mr. Lasky): Now later you personally saw Mr. Lofendo did you not? A. I did.

Q. And Mr. Rosenthal and he came into the branch one day? A. Yes, sir. [357]

Q. And was it Mr. Estribou or Mr. Tarr who brought them over to you and asked you to talk to them? A. Mr. Tarr.

Q. Mr. Tarr. And what date did that occur upon?

A. Oh, it occurred after the memorandum.

Q. Yes, and——

A. Toward the latter part of October.

Q. Toward the latter part of October, 1948?

A. Yes.

Q. And Mr. Rosenthal introduced himself to you as secretary-treasurer of United Produce Company, did he not?

A. I believe that is his title, that he gave.

Q. And at that time you had a conversation with Mr. Rosenthal and Mr. Lofendo, did you not?

A. Yes, sir.

Q. Please relate what the conversation was.

A. I believe it went along these lines, that Mr. Rosenthal introduced himself,——

Mr. Erskine: Well, pardon me. Speak just a little louder.

A. (Continuing): That Mr. Rosenthal introduced himself and stated that we had sent a communication to Frank regarding his account, and——

(Testimony of Joseph V. Cosgrove.)

Q. To Frank? A. To Frank.

Q. Referring to Lofendo? [358]

A. Referring to Lofendo.

Q. Pardon me. Go ahead, please.

A. And that perhaps he could be of assistance.

Q. Yes; will you continue?

A. So I told him that under the circumstances, that we were paying Mr. Lofendo's checks prior to their being cleared, that we wanted him to discontinue that practice; in fact, he would have to discontinue that practice. That we wanted him to give the checks a chance to clear before he drew funds against them. Also that due to the fact that the account had such large items going out, that we wanted a larger balance created.

Q. Your branch wanted a larger balance maintained at all times? A. Yes, sir.

Q. Did you say anything about twenty or thirty thousand dollars?

A. No, sir, no amount was mentioned.

Q. All right, go ahead. What else?

A. And also we wanted an explanation of the reason why checks were payable from Lofendo to United and from United back to Lofendo.

Q. And did Mr. Rosenthal give you some explanation? A. Yes, sir.

Q. What was it?

A. He gave the explanation that they were buying and selling for the account of Lofendo and that rather than carry an account on their books, they were selling on a cash basis; in other [359] words, that they made their settlement by check.

(Testimony of Joseph V. Cosgrove.)

Q. Yes, and then what else was said?

A. So I told him then that we wanted a statement on the company letterhead, in other words, a letter from United Produce, to that effect; that in order that we would have in our files a statement from them that the transactions were bona fide purchases and sales.

Q. Did he say he would give you one, give one to you?      A. Yes, sir.

Q. Did he say how soon he would get it to you?

A. He led me to believe it would be forthcoming when he got back to Chicago.

Q. And that is the whole of the conversation?

A. Yes, sir.

Q. And then after they left, Mr. Lofendo and Mr. Rosenthal left, you told this conversation to Mr. Tarr, did you not?      A. Yes, sir.

Q. And then you never got the promised letter?

A. That is correct.

Q. And when about ten days had elapsed and the letter still hadn't arrived, that fact completely shook your confidence in the truth of Rosenthal's story, did it not?

A. Well, it didn't happen just exactly that way. In other words, Mr. Tarr and I were discussing the matter before our officers' meeting—— [360]

Q. The Officers' meeting of the 10th of November?      A. Yes, sir.

Q. Yes, proceed, please.

A. And Tarr said that their account had not improved. In other words, that Lofendo was still drawing down the checks as fast as they were

(Testimony of Joseph V. Cosgrove.)

presented, and that,—so I told him that we had not got the letter, and I thought it would be best to discuss it again at the officers' meeting.

Q. Yes. And now I call your attention to your deposition, page 11, line 17, counsel.

Mr. Erskine: Let me read it with you, please? I misplaced mine.

Mr. Lasky: Certainly.

“Q. Now when you failed to get the letter from Mr. Rosenthal, did that make you doubt the truth of that story that Mr. Rosenthal had told you?

“A. It, you might say, shook my confidence.”

Is that correct?

A. Yes, sir. It did. In other words, up to that point I had complete confidence in the arrangements that they had mentioned.

Q. Yes, but after that point, when you failed to get that letter, you no longer had that confidence?

A. No, sir.

Q. You proceeded to tell Mr. Tarr and Mr. Estribou accordingly? A. Yes, sir. [361]

Q. And then the two of you said together, Mr. Tarr and you, “It looks as if we won't get that letter, and we had better refer the matter to Mr. Estribou”?

A. Some words to that effect, before the meeting.

Q. And thereupon it was taken up at the officers' meeting of November 10th? A. Yes, sir.



(Testimony of Joseph V. Cosgrove.)

Mr. Lasky: That is all, Mr. Cosgrove.

Mr. Erskine: Just a second, Mr. Cosgrove.

### Cross-Examination

By Mr. Erskine:

Q. Counsel asked you about the conversation between you and Mr. Tarr that preceded the preparation of the memorandum of October the 22nd. Plaintiff's Exhibit No. 12; do you recall that?

A. A conversation prior?

Q. Yes.

A. That one would be when Mr. Tarr returned from his vacation.

Q. Yes, when Mr. Tarr returned from his vacation, yes.      A. Yes, sir.

Q. Was there anything said in that conversation with respect to an inquiry being made of the Merchandise National Bank?

A. I believe that Mr. Tarr said he would send a wire to the Merchandise National Bank regarding the account of United Produce.

Q. And do you know whether such a wire was sent? [362]

A. Not from my actual knowledge. In other words, I didn't see the wire go out, but——

Q. Did you know whether the bank got a response to that?      A. Yes, we did.

Q. Yes. I will show you a wire dated October the 20th and marked Defendant's Exhibit O (handing to witness); did you ever see that wire?



(Testimony of Joseph V. Cosgrove.)

A. Yes, sir.

Q. Did you see it shortly after it came in?

A. Probably the same day or the next day.

Q. Now after your conversation with Mr. Lofendo and Mr. Rosenthal, did you make any inquiry of anybody with respect to the United Produce Company?

A. Yes, sir.

Q. Who was that?

A. I contacted Mr. John Tozzi.

Q. Who is Mr. Tozzi?

A. Mr. Tozzi is a rancher and grower and shipper in the Bakersfield area.

Q. Is he a man that has lived in that vicinity for some time?

A. I have only been personally acquainted with him since 1948. However, I think he has lived there for quite a few years. In other words, his father lived there before him.

Q. What is that?

A. His father died, I believe, in 1947. [363]

Q. Yes. And you asked Mr. John Tozzi about the United Produce Company?

A. I asked him if he was——

Mr. Lasky: Just a moment, please; I object to any conversation that went on between this witness and Mr. Tozzi, who is not a party to this case. Certainly it can't be binding upon the plaintiff here.

Mr. Erskine: Just a question of this witness' knowledge and understanding about the United Produce Company and the information upon which he was acting. That is all.

(Testimony of Joseph V. Cosgrove.)

The Court: Well, of course, the only information upon which he could act, in any event, would be the information with reference to his financial condition in Chicago, isn't it? That is the only information that would have any bearing on the matters here.

Mr. Erskine: Well, I think——

The Court: And that is, in other words, just because information that it had bought and sold in the Bakersfield area; that wouldn't mean anything, would it?

Mr. Erskine: Well, if Mr. Tozzi told the witness that he dealt with the United Produce Company, had sold them more than \$100,000 in produce in the preceding year, that they were a good concern, that would have some bearing, it would seem to me, upon the state of mind of this witness.

The Court: Well, I don't see what it is, but I will let [364] you put it in.

Q. (By Mr. Erskine): What did Mr. Tozzi tell you?

A. Mr. Tozzi told me that he had shipped to United Produce, I believe, produce on which he expected payment in excess of \$200,000, and that he had owed him up to, I should say, \$100,000 on shipments at one time, and that their checks were all right.

Q. Mr. Tozzi was a big grower down there, was he?

A. Yes, sir.

Q. When did you leave on your vacation, Mr.——

A. On November 13th.

(Testimony of Joseph V. Cosgrove.)

Q. When you left on your vacation, on November 13th, did you suspect or believe that the United Produce Company and Lofendo were engaged in a kiting operation?      A. No, sir.

Mr. Erskine: That is all.

Mr. Lasky: No further questions.

(Witness excused.)

The Court: The Court will stand in recess until a quarter after three.

(Recess.) [365]

ALLEN R. LeROY

was called as a witness on behalf of the Plaintiff, being first duly sworn testified as follows:

Q. Will you state your name to the Court, please?      A. Allen R. LeRoy.

Direct Examination

By Mr. Lasky:

Q. What is your residence, Mr. LeRoy?

A. Evanston, Illinois.

Q. And what is your occupation?

A. Banker.

Q. With what bank are you employed?

A. Merchandise National Bank of Chicago.

Q. What capacity?

A. Executive vice president.

Q. Executive vice president?

A. At the present time.

(Testimony of Allen R. LeRoy.)

Q. How long have you been with the Merchandise National Bank?

A. Since January, 1938.

Q. During that entire period your capacity has been what?

A. Vice president or executive vice president.

Q. How long have you been a banker?

A. Since 1912.

Q. Before you came to Merchandise National Bank, with whom were you engaged?

A. Immediately preceding it I was with a firm of Brown, Harriman [366] Company for about a year. Prior to that I was with the Reconstruction Finance Corporation.

Q. For how long was that?

A. A little over two years with them.

Q. And in what capacity?

A. I was examiner in the Washington office, examiner in charge of reorganization of banks, and then the manager of the Los Angeles agency of the Reconstruction Finance Corporation, and for a short time upon organization, the Reno office of the Regional Agricultural Credit Corporation.

Q. Manager of the Regional Agricultural Credit Corporation at Reno?      A. At Reno.

Q. And before that with whom?

A. Vice President of the Los Angeles Investment Company.

Q. And prior to that what was your occupation?

A. I was with the Federal Reserve Bank of Chicago.

(Testimony of Allen R. LeRoy.)

Q. For how long?

A. A little over six years.

Q. And prior to that you had been with other banks?

A. I had been president of a bank in Iowa, Manchester, Iowa.

Q. Where were you on November 17th, 1948?

A. Chicago, Illinois.

Q. Where were you the next day?

A. San Francisco. [367]

Q. How did you arrive from the one place to the other? A. Plane.

Q. You left Chicago about midnight?

A. About midnight of the 17th.

Q. When you arrived in San Francisco where did you go? I do not mean about a hotel. We can skip the hotel. But where did you go?

A. The head office of the Bank of America.

Q. Whom did you call upon?

A. Mr. Duncan.

Mr. Lasky: May I inquire at this time of counsel whether he is prepared to give us a stipulation about Mr. Duncan's position and authority that we discussed the other day?

Mr. Erskine: Well, I have thought about that, Your Honor, and I am prepared to do something like this; if agreeable to the Court and counsel. I am prepared to stipulate that if the Court finds that there was some sort of enforceable agreement made by Mr. Duncan and Mr. Kenneth Johnson with the Merchandise National Bank on November 18th, aris-

(Testimony of Allen R. LeRoy.)

ing out of the conversations of that day, such agreement shall be considered binding upon the Bank of America, subject to whatever defenses we may have as to the agreement, and that we will not challenge Mr. Duncan's and Mr. Johnson's authority to make it, but at the same time I want at least to show the facts with respect to the relationship of Mr. Duncan and Mr. Johnson to the bank and to this transaction and, the relationship of the branch to it, and the respective authorities possessed by [368] Duncan and Johnson and the branch with respect to it.

The Court: What difference does it make what those relationships are if he had authority to speak and bind them?

Mr. Erskine: It does not make any difference except as a circumstance, which I would like to have the Court consider.

The Court: How long is it going to take to show those circumstances, counsel? I do not see wasting a day's Court time on that sort of thing if in the final analysis you arrive at the conclusion that Mr. Duncan had authority to represent the bank in the manner in which he did.

Mr. Lasky: If that stipulation is granted, that is all I need. We can skip a great deal of interrogation about Mr. Duncan's authority.

Mr. Erskine: I would like to have that.

The Court: What would the color go to?

Mr. Erskine: Well, it seems to me it would have

(Testimony of Allen R. LeRoy.)

some bearing upon whether or not any commitment was actually made, whether that was the fact, but I am not going to say that if the Court finds such a commitment was made—I am not going to raise the defense of lack of authority.

The Court: Of course, that is all that counsel is interested in.

Mr. Lasky: That is all I am concerned with.

The Court: The Court has a further interest in the matter, Mr. Erskine, of conserving some time here. I appreciate that [369] sometimes counsel like to get in the color of the thing, but that is only when it affects the principal point involved. Now, if the principal point is did Duncan have authority, and the answer to that is “yes” the color means nothing to me. It can’t help me any.

Mr. Erskine: I will bear that in mind in my examination of Mr. Duncan.

The Court: But it may be stipulated that Mr. Duncan in his conversations with Mr. LeRoy—

Mr. Lasky: And in the letters he wrote to Estribou.

The Court: And in the letters he wrote, had authority to represent the bank in the matters in which he held himself out to represent them?

Mr. Erskine: Yes, I will agree to that subject to my right to offer other evidence if I see fit to do so.

The Court: Is that agreeable?

Mr. Lasky: Of course, if he puts on other testi-



(Testimony of Allen R. LeRoy.)

mony which seems to detract from he has stipulated to——

The Court: It won't make any difference to me if he does. The finding will be that Mr. Duncan had authority, if counsel has stipulated to that.

Mr. Erskine: That is right.

Mr. Lasky: That satisfies me. We can skip all that stuff about Mr. Duncan's authority.

The Court: Very well. [370]

Q. (By Mr. Lasky): You say you called and talked to Mr. Duncan? A. I did.

Q. At the headquarters office of the Bank of America in San Francisco? A. Yes, sir.

Q. Did you speak to Mr. Duncan about six checks totalling \$113,216.50 drawn by the United Produce Company to the order of Lofendo which had been sent by the East Bakersfield branch of the Bank of America to your bank for collection? Yes or no. A. Yes.

Q. When you spoke to him on this subject, I suppose we should ask you who was there present.

A. Just Mr. Duncan and myself. I was sitting at his desk talking to him.

Q. What time of day when you first spoke to him on the subject?

A. I would say it was approximately ten o'clock in the morning.

Q. And you have already stated where. Will you please state to the Court, relate the conversation that occurred between you and him at that time about the six checks.



(Testimony of Allen R. LeRoy.)

Q. I acquainted Mr. Duncan with the developments in the United Produce case that afternoon before, told him that it appeared that we were the victims of a swindle, and involved in the matter were six checks totalling around \$113,000 received by us in a collection letter on which an advice of credit had been sent out; that the advice of credit had been mailed in error [371] on account of the fact that we were not familiar at the time it was mailed with the fact that the credits, which purported to show a black balance were fictitious credits, based on fictitious items, and for that reason Mr. Messenger had called Mr. Estribou at the East Bakersfield branch and informed him that the credit had been revoked, and that when I left Chicago it was with the idea of going directly to Bakersfield and pick up the items, but I found out——

Q. Pick up the which?

A. Pick up the advice of credit which had not up to that time been received by the East Bakersfield branch, according to the information which Mr. Messenger had given me the afternoon before, but that I found there was no direct connection to Bakersfield, and consequently, knowing that in the long run I would have to come to San Francisco, I stopped at the San Francisco office, central office, and immediately got in contact with them so that they would be in a position to know the full developments in the case. I told him the credit had been rescinded.

(Testimony of Allen R. LeRoy.)

Q. Did you tell Mr. Duncan how the fictitious credits had come about?

A. Not in any great detail, no, sir.

Q. To what extent did you tell him?

A. I told him that they were largely items arising—they were items drawn on the East Bakersfield branch by one Frank [372] Lofendo, payable to the order of the United Produce Company; that the information which we had received indicated they were fictitious and of no value.

Q. Did you tell Mr. Duncan how Merchandise Bank had first learned that the items drawn on the East Bakersfield branch totalling several hundred thousand dollars and concerning which you had not learned the fate were not good?

A. I did.

Q. What did you tell him?

A. I told him we were first alerted by a telegram or, by the return of items, similar items, by the East Bakersfield branch the day before which had led to an investigation of the entire United Produce matter, and Mr. Messenger's call with Mr. Estribou, and in addition to that the conference with Mr. Rosenthal, in which he had admitted large discrepancies and fraudulent conduct, and our quick audit, the findings of our auditors, which were made before I left.

Q. Did you have with you when you talked to Mr. Duncan a list of checks drawn on the Lofendo account at East Bakersfield?

A. Yes, sir.

Q. Of which you had not yet learned the fate?

A. Yes, sir.

(Testimony of Allen R. LeRoy.)

Q. At that time you had such a list?

A. Yes, sir.

Q. Did you show it to Mr. Duncan? [373]

A. I did.

Q. Did you have any discussion with him about the items on it?      A. I did.

Q. What was that discussion?

A. I told him those were the items on which we had not received any report as of the afternoon before, and that I was very anxious to find out where they were and what their fate would be and get them back. Apparently there were no funds to pay them in East Bakersfield, and as Mr. Estribou had advised us, there would be no more deposits accepted, that there was no chance of getting them paid, and we wanted to get them returned immediately to find out what our entire situation was.

Q. What then happened after this conversation with Mr. Duncan in the morning?

A. Mr. Duncan put in a call for the East Bakersfield branch to Mr. Estribou.

Q. A telephone call?      A. Yes, sir.

Q. How many telephone calls did Mr. Duncan have with Mr. Estribou on November 18th while you were present at Mr. Duncan's end of the line?

A. Two.

Q. Two? And when did the second one occur?

A. In the afternoon.

Q. Are you able to segregate in your recollection now what was [374] said in the two conversa-

(Testimony of Allen R. LeRoy.)

tions by Mr. Duncan so far as you heard the conversation?

A. Not entirely, but to a large extent. I would not want to be bound absolutely by what happened, one conversation and another. I know what happened in both of them, and I think I am quite clear as to what happened in each one.

Q. All right. You said the first telephone conversation occurred between Mr. Estribou and Mr. Duncan when? A. In the morning.

Q. And the second one in the afternoon?

A. Yes, sir.

Q. By the way, before we get into those telephone conversations, did you during the course of that day discuss other matters or any other matters with Mr. Duncan besides the six checks, the advice of credit, and the items that had been drawn on the East Bakersfield branch? A. Yes, sir.

Q. Between the first telephone conversation of Mr. Duncan with Mr. Estribou with East Bakersfield and the second one, what did you and Mr. Duncan do?

A. We went to, what they call, I think, the central office of the Bank of America, which was a transit office where all their items were collected and rerouted or sent out to their branches.

Q. Another building? A. Yes, sir. [375]

Q. What did you do when you were there, the two of you together?

A. Talked to the man in charge, or the man

(Testimony of Allen R. LeRoy.)

apparently in charge, and Mr. Duncan left a list of checks for which we were looking and asked him to ascertain their whereabouts, if they could find out whether they had been sent out to the branch or whether they were in that office, and also asked him to find out whether the advice of credit covering \$113,000 had been received.

Q. Then where did you go from there?

A. Lunch.

Q. With Mr. Duncan? A. Yes, sir.

Q. And then after lunch where did the two of you go?

A. We returned to the central office, the transit office.

Q. And what happened there?

A. They advised us as to what they had been able to find out. If I remember correctly, they had determined that a few of the checks had been sent to East Bakersfield and that others were in that office, and my impression is that they said that the credit advice had not been received.

Q. Then where did you go?

A. Back to Mr. Duncan's office.

Q. Now, you recall that sometime during the day you wrote a letter to the Bank of America right then and there in their office?

A. Yes, sir. [376]

Q. It is Plaintiff's Exhibit 10 in this case. What time of day was it that that was dictated?

A. Well, it was after we returned from lunch. I would say that it was between one and two o'clock.

(Testimony of Allen R. LeRoy.)

Q. At whose suggestion was it written?

A. Mr. Duncan's.

Q. At Mr. Duncan's? A. Yes.

Q. What was it that he said?

A. He said, "I would suggest that you outline this whole situation in a letter so that we will know the checks on which you are wanting information, and also include in that the information—or the notice that the advice of credit has been rescinded, and that will be a matter of record in our office."

Mr. Lasky: I won't reread the letter. I read one part of it formerly and the first part of it has to do with these checks, so it is not necessary to read it.

Q. After it was transcribed what did you do with it?

A. Well, when I saw it, I read it and went over it with Mr. Duncan and signed it.

Q. And gave it to him? A. Yes, sir.

Q. Will you relate to the best of your recollection what you recall Mr. Duncan saying to Mr. Estribou in the first telephone conversation that he had on that day that you were present? [377]

A. He told Mr. Estribou that I was at his desk rather than in Bakersfield on account of not being able to make the right plane connections, that he had been going over the situation with me, that I wanted to have information with respect to various checks and any developments since Mr. Messenger talked with him the afternoon before, and also referred to the fact that the advice of credit covering

(Testimony of Allen R. LeRoy.)

\$113,000 had been rescinded and asked Mr. Estribou whether their copy had been received.

Q. Their copy of what?

A. The advice of credit.

Q. After he had hung up did he or did he not say to you what had been said in the telephone conversation?

A. He told me that insofar as he was able to find out at the present time, the situation was practically the same as it was the afternoon before. The balance had not changed.

Q. The balance of what?

A. The balance of the Lofendo account, the credit balance, which had reported \$690 odd dollars, had not changed, but Mr. Estribou was to make an investigation and call him after lunch and find out more about the situation at that time.

Q. After Mr. Duncan hung up on the first telephone conversation, did he telephone anybody else in your presence?

A. Yes, sir, Fresno, the French branch of Bank of America.

Q. After he hung up on that telephone conversation what did he tell you, if anything, about what had been said? [378]

A. He said that he had telephoned Fresno because he had ascertained from his conversation with Bakersfield, East Bakersfield, that Fresno had some dealings with the United Produce Company. In view of the situation, he wanted to know if they



(Testimony of Allen R. LeRoy.)

were alerted to discontinue any business that they might be doing with them.

Q. Will you relate what you can allocate to the second telephone conversation? [378A]

A. Yes, he told them that he had received a letter giving the list of the checks, and that a copy would be sent to them so that they could act on it and also the formal notice of the revocation of the advice of credit which was in the letter; that they would receive the letter the next day, and he also told Mr. Estribou that I was coming to Bakersfield and that I had discussed with them—with Mr. Duncan the possibility of their checking over the account with me and seeing if any of the information would be of value to us in our dealings with United Produce, and in determining our true position, and it would be all right for him to cooperate with me in doing that.

Q. Will you relate what you heard Mr. Duncan say in either of these two telephone conversations with East Bakersfield but which you were unable to allocate to either the one conversation or the other conversation?

A. In one conversation or the other he did say to whomever he was talking to at the other end—I understood it was Estribou but I have no knowledge of that, of course—"Well, that is fine and you are to be congratulated. You are mighty lucky you are in the clear."

Q. Was anything said in either of the telephone conversations about the advice of credit?



(Testimony of Allen R. LeRoy.)

A. Yes. Mr. Duncan in both of them told them that it had been revoked and that the head office was familiar with the fact. In the first one he did not say they concurred with it, but in the [379] second he said—I wouldn't say definitely that he said he concurred with it but he said it had been revoked.

Q. Was anything said about what was to be done with it, the physical disposition?

A. It was to be returned to me.

Q. To you when?

A. When I went to Bakersfield the next day.

Q. After Mr. Duncan hung up on the second conversation to East Bakersfield did he state to you what had been said to him in that conversation?

A. In the second conversation or in either one of them?

Q. In either one of them.

A. I have already, I believe, stated that apparently the East Bakersfield Branch was in the clear, that fortunately they had been alerted to the situation and were only paying against collected funds, and consequently they were all right.

Q. Did he state how East Bakersfield had been alerted? I mean did he state what was said to him as to how East Bakersfield had been alerted?

A. He told me that they had been alerted through some communications from the Merchandise National Bank of Chicago. What communication he was referring to I have no knowledge. [380]

Q. Well, now, after these two telephone con-

(Testimony of Allen R. LeRoy.)

versations had occurred, did you talk to anyone else at the Bank of America in San Francisco on that day?      A. Yes, sir.

Q. With whom?

A. With Mr. Kenneth Johnson, assistant counsel, I think.

Q. Well, was he introduced to you?

A. Yes, sir.

Q. And he was introduced to you as assistant legal counsel?      A. Yes, sir.

Q. Who introduced him?      A. Mr. Duncan.

Q. About what time of the day was it that you saw him?

A. Approximately three o'clock. It was after I had dictated, returned from lunch, and had dictated the letter, I think. And we went up to talk to him.

Q. Was it before or after your letter was transcribed, do you recall?

A. I think it was before the letter was transcribed.

Q. After it was dictated and before transcription, according to your memory?      A. Yes, sir.

Q. Now, you say you and Mr. Duncan together went to Mr. Johnson's office?

A. Yes, sir. [381]

Q. Mr. Duncan took you there?

A. Yes, sir.

Q. And did you have a conversation, was there a conversation among the three of you at that time?

A. Yes, sir.

(Testimony of Allen R. LeRoy.)

Q. Will you relate to the Court the conversation as you recall it?

A. Well, in substance Mr. Duncan outlined the situation to Mr. Johnson and said that a letter had been written giving instructions to the Bank of America to return these checks waiving presentation and protest; and also revoking the advice of credit. And saying that as a matter of formality, he wanted Mr. Johnson's approval of the situation.

Q. And what then occurred, what did Mr. Johnson say?

A. After some discussion, Mr. Johnson said, "Well, the Merchandise National Bank is entirely within their rights in revoking this credit," and he turned to Mr. Duncan and said, "You have told Mr. Estribou that the credit has been revoked——"

Q. He told him that or asked him that?

A. Well, it was in the form of a question, yes; he made it as an interrogatory statement. He says, "You have told Mr. Duncan?"

Q. I see. Go ahead.

A. Very definite. And Mr. Duncan said, yes, he had told Mr. Estribou. Mr. Johnson said, "I want to telephone Mr. Estribou myself, because the Bank of America will pay against that credit at their peril." Those are the words that he used. [382]

Q. Now did he telephone to Mr. Estribou or to the East Bakersfield branch? In your presence?

A. Yes, sir.

Q. And were you present when the conversation occurred?

A. Yes, sir.

(Testimony of Allen R. LeRoy.)

Q. And what was said by Mr. Kenneth Johnson in that telephone conversation, as you heard it?

A. He asked Mr. Estribou if he was familiar with the situation and outlined the fact that the letter was going to come to him, that it would be all right to cooperate with me in giving me the information, and furthermore, asked him if he definitely understood. First he asked him if the advice of credit had been received. He said no. He said, "Do you understand that it is not to be acted on, and furthermore, when Mr. LeRoy comes to Bakersfield, it is to be returned to him."

Q. Anything else occur in the phone conversation that you recall?

A. No, not of any material consequence, at least, as I remember.

Q. Well, now, after Mr. Duncan—pardon me. After Mr. Johnson hung up from that phone conversation, did he say anything to you, did Mr. Johnson say anything to you about what had happened?

A. He said Mr. Estribou understood the situation.

Q. About what time of day was that? [383]

A. Well, between 3 and 4 o'clock, I would say.

Q. And then did you leave the Bank of America that day? A. Yes, sir.

Q. And did you go to Bakersfield, I mean, at any time?

A. Not that day. Yes, during the next day.

(Testimony of Allen R. LeRoy.)

Q. You went to Bakersfield the next day. How did you go there?      A. Plane.

Q. Plane, and what time of the day did you arrive?

A. Well, the plane was late. I would say it was about 2 o'clock.

Q. Was it any later than 2:30 at the most?

A. I think I got to the bank in Bakersfield, East Bakersfield, just before the closing hour.

Q. Just before closing hour?      A. Yes.

Q. And about what time of the day was that, for those of us who don't know closing hours?

A. Three o'clock, I think.

Q. All right. And when you got there, into the East Bakersfield branch, will you relate what happened?

A. I stood in the lobby, looked the branch over, and saw Mr. Estribou's desk was over away from the counter.

Q. Well, how do you know it was Mr. Estribou's desk?

A. Because he was pointed out to me, and I think it also—my memory is that there was a plate on his desk. But at least——

Q. All right, go ahead. I was just curious. [384]

A. I was told he was Mr. Estribou or saw his nameplate there. I knew who it was anyway. He was talking to a customer at the time.

Q. Yes.

A. And while I was standing there, I think I remember that the bank closed, and I remember

(Testimony of Allen R. LeRoy.)

then it was quiet in the lobby, and Mr. Estribou talking over the telephone and looking out in the lobby and saying, "Yes, I think he is here now."

Q. And then after Mr. Estribou hung up on that phone, did he come over to you?

A. Not until he had finished the conversation that he had with the customer that he was busy with.

Q. But did he finally talk to you?

A. Yes, sir.

Q. And will you tell us just what that conversation was?

A. He says, "I am sorry, but I can't talk to you about this Lofendo deal." And I was very much surprised, not having heard anything since I had left the Bank of America, and said, "Why not?" And he says, "Well, I just can't do it."

And he said, "There are some people coming down from the head office tomorrow. You can talk to them." I said, "May I talk to the head office on your telephone?" He said, "It won't do you any good." And then I said, "May I call a taxicab?" And he laughed and says, "Well, you don't have to do that. I will be glad to take you down town." And he did. [385]

Q. And you left the bank? A. I did.

Q. And when to your hotel? A. Yes, sir.

Q. In Bakersfield? A. Yes, sir

Q. What did you do there with respect to this subject matter?

A. I immediately put in a call for either Mr.

(Testimony of Allen R. LeRoy.)

Duncan or Mr. Kenneth Johnson at the head office of the Bank of America in San Francisco.

Q. Did you ask for Mr. Duncan?

A. Yes, sir.

Q. You get him?                      A. No, sir.

Q. Did you ask for Mr. Johnson?

A. Yes, sir.

Q. Who came on the line?

A. Mr. Schilling.

Q. Somebody who announced himself as Mr. Schilling?                      A. Yes, sir.

Q. Had you ever heard of Mr. Schilling before?

A. Not to my knowledge.

Q. And what was it that Mr. Schilling said to you on the phone then?

A. He said that he was the—I don't know whether he said [386] "counsel" or "assistant counsel." But anyway, he said that he was acting for Mr. Kenneth Johnson in his absence, and that there had been certain developments that made it necessary for them to make an investigation into the entire matter, and that somebody from their auditing department would arrive in Bakersfield the next morning who would get in touch with me. In the meantime, there was nothing else to say.

Q. And that was the phone conversation?

A. Yes, sir.

Q. And did anybody get in touch with you the next day, Saturday, the 20th of November, 1948?

A. Yes, sir.

Q. Who did?



(Testimony of Allen R. LeRoy.)

A. First thing in the morning, about 8 o'clock, I would say.

Q. Who was it? A. Mr. Lloyd Tobey.

Q. And what did he tell you?

A. Said that he was from the controller's department or the auditor's department; anyway, he was down there to make an investigation of that situation in the branch and suggested I——

Q. When you say Mr. Tobey, you refer to the gentleman seated there (indicating)?

A. I do. Suggested I come down and have breakfast with him.

Q. Was there anything further discussed about the subject matter with Mr. Tobey? [387]

A. In general, yes. Mr. Tobey told me that there had been developments in connection with the matter. I think he said what they were, that \$97,000 worth of checks, they had been notified as to the non-payment of \$97,000 worth of checks by Merchandise National Bank, and that this had made it necessary for them to get into the entire situation and determine what it was.

Q. Now did you see Mr. Estribou again?

A. Yes, sir.

Q. When was it you next saw Mr. Estribou?

A. Sunday. Sunday, the 22nd, was it? I think so.

Q. Well, taking our chronology, Sunday was the 21st. But it was Sunday?

A. It was Sunday. That was the 21st.



(Testimony of Allen R. LeRoy.)

Q. Where did you see him?

A. At the East Bakersfield branch of the Bank of America.

Q. What time of the day?

A. I think it was just about noon.

Q. About noon, and who was present then and there?

A. Well, Mr. Estribou, Mr. Tobey, the assistant supervisor of the branch of the Bank of America—his name was Libbey?

Q. Branch supervisor?

A. Yes, assistant supervisor, or—well, he was introduced to me, anyway, and Mr. Biancho.

Q. Was Mr. Biancho introduced to you at the beginning of the [388] conversation?

A. As Mr. Biancho.

Q. Yes. And after the conversation had proceeded some time, were you informed in what capacity he was there?

A. He informed me.

Q. He informed you after you had been talking some time?

A. In a little while he said, "In fairness to you, I want to tell you that I am an attorney acting as an attorney."

Q. Acting—did he say he was acting on behalf of the Bank of America?

A. Yes.

Q. You recall Mr. Biancho, who was in this courtroom as attorney for Mr. Mouradick at the opening of the trial; was it the same Biancho?

A. I think so. Looked familiar to me.

(Testimony of Allen R. LeRoy.)

Q. Yes. Now did you get the advice of credit?

A. I did not.

Mr. Lasky: Now, if the Court please, we have come to the other elements I was going to ask the witness about, the demands made for the return of the money at the head office when I was present on the 23rd, and I am still hoping we are going to have that whole thing with a stipulation which has been submitted to counsel for approval.

Mr. Erskine: Well, did we read that the other day?

Mr. Lasky: Yes, yes, you have it in your possession. It [389] is a very short stipulation that covers that, and a couple of other elements. I was waiting for you to give me a revise on one paragraph you said you wanted to revise.

Mr. Erskine: Yes, that is right. I haven't had a chance yet to work at that, your Honor.

Mr. Lasky: Well, then, may I reserve the right to recall Mr. LeRoy on the subject if the stipulation for some reason falls through?

The Court: Yes.

Mr. Lasky: That is the end of my direct. Your witness, Mr. Erskine.

Mr. Erskine: Well, it is practically 4 o'clock. Does the Court want me to go ahead now?

(Whereupon discussion was had among Court and counsel relative to time schedule for the remainder of the case at bar; after which the following occurred:)

The Court: Yes. Well, I think probably that will be the thing to do. If we can meet tomorrow morning and try to dispose of the plaintiff's case, aside from the question of the stipulations, tomorrow morning; and then for the benefit of counsel, take the afternoon off to work out some of these other matters, and now if that were done and you could accomplish tomorrow afternoon some of these matters, do you then think you can finish your case in the ordinary working day on Thursday and Friday? [390]

Mr. Erskine: Well, we might not be able to, but if we don't, we will extend the working day.

The Court: Yes, all right.

Mr. Erskine: I was just thinking about tomorrow. Let's start, then, at 10 tomorrow and give me the afternoon, and then on the succeeding days, if it appears necessary, we will extend the working day.

The Court: Very well, the Court will stand in recess until 10 o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10 o'clock a.m. tomorrow morning, Wednesday, June 21, 1950.) [391]

The Clerk: Merchandise National Bank v. The Bank of America, on trial.

Mr. Erskine: If the Court please, before I go ahead with my cross-examination of the witness I would like to say this: I have been thinking seriously about the course of this trial since our conversation of last evening. Mr. Lasky and the

plaintiff have been putting on their case. They are still engaged in putting on their case, and have by what is proper objection, prevented me from going into my defense upon the cross-examination of their witnesses. In addition to that, they have not only gone into their case in chief but have spent quite a bit of time in rebuttal. We have been on trial here since Thursday. This is Wednesday. Probably if we go all day today they will finish their case today, which will give them five days of trial, four and a half if you exclude the time spent in the opening statements. We, on the other hand, will probably have two days of trial which will be hurried days. That situation is not what I would like it to be. This case is important to my client, and we spent an enormous amount of labor in the preparation of it. But at the same time I want to do my utmost to get the case finished. I have tried to do that right along and I will continue to do it. But I do not want to curtail my cross-examination or curtail the presentation of my case.

The Court: Mr. Erskine, you are not going to be limited to two days if your case is not in in that time. Of course, you are going to have further time. The court has felt from the [392] start of the trial, however, that neither party has taken advantage of the Federal procedure. The procedure is developed to eliminate so many issues and to settle all those matters before trial. There are matters that the Court need not have to decide. We have spent a great deal of time, not in the trial of the plaintiff's case, but in conferences in the nature

of pre-trial conferences. Those conferences have led not only to admissions made for the benefit of plaintiff but were some of those facts that were facts that you yourself would want to prove. So what has gone on so far has not all been just for the benefit of the plaintiff.

As I say, however, I do feel that the parties have not taken proper advantage of the Federal procedure in this case. However, I am stuck with it, whether you have or you have not. I am not going to prevent any party from putting in his case. I do have the right, however, to speed it along as much as possible, and in that connection we are going to have some extended days of trial now, because I do not think it is fair to the Court to drag the matter out. I think we have only been working a four-hour day, and that is not fair to the Court.

I will tell you this: I am down here, Mr. Erskine, not for my benefit, I will assure you of that, and not for any judge's benefit down here in San Francisco. I am down here for your benefit. I am down here to help litigants who are faced [393] with crowded calendars. It does not help the judges here any for me to come down, because they are just continuing to operate in the course of the trial. They are operating the same now as if I were not here and they will continue to operate after I leave just as I had never been here. What I dispose of it rather infinitesimal, I guess, in the whole calendar that faces them. And so the only thing that I have done is inconvenience myself, at a personal cost of money, to come down and spend time. It is not fair

under those circumstances to me, I feel, for litigants to quibble about matters, not having beforehand taken the full advantage in the preparation of the case in the disposition of issues that could have been disposed of. Under those circumstances I am not going to—don't misunderstand me—I am not going to prevent you from proving anything, putting on the proof that you feel that you should prove. But in doing that, I think it is perfectly fair to all parties to say, well, of course, we are getting to the end of this matter. The time I have allotted to spend in San Francisco is drawing to a close, and so we will meet at nine o'clock in the morning, work until noon, meet at two and work until five or six and then if you are going to dispose of the case, we will work on Saturday and then we might have a night session or two. Your case is prepared before this. Spending a few hours, of course, I realize is a strain, but it is just as much a strain on my part as it is on anyone else, and I want to dispose of the matter. [394]

Mr. Erskine: Your Honor, I certainly want to help you dispose of this. I think I have not been quibbling. At least I have not tried to quibble. I think I have been trying to come along as best I can, and it may be that we did not take the full benefit of the Federal Rules in the pre-trial conference.

The Court: There are demands for admission of the genuineness of documents and other admissions of facts.

Mr. Erskine: I have a suggestion to make, and



I sort of almost hesitate to make the suggestion, but I thought about it and I know that the Court will not resent the fact that I am going to make it. I would like to go ahead all of today. What I am afraid of is, if we take this afternoon off, the first thing I know, my days of trial and cross-examination and the presentation of my witnesses will not be enough, will not be sufficient, so I would like to go ahead this afternoon and get all the testimony out of the way, if possible, before Saturday. I understand that the Court is going to attend the Judicial Conference.

The Court: I am supposed to, but I will tell you this: I am required by law to attend it, but I can be excused by the Chief Judge of the Court of Appeals.

Mr. Erskine: I was not suggesting that you be excused, your Honor. What I was going to suggest is, if you are going to be here next week—the conference is going to take place in San Francisco, is it not? [395]

The Court: Yes. [395A]

Mr. Erskine: I assume it begins at ten o'clock.

The Court: I do not think they work too hard at the conference.

Mr. Erskine: This thought occurred to me, that perhaps your Honor would permit us to go ahead and put in all the testimony we can put in up until Saturday, and if necessary go ahead on Saturday, and then next week Mr. Lasky and I can wrestle with the stipulations, the depositions, and that sort of thing, and if your Honor would be available at



nine o'clock in the morning and give us a half hour every morning, if necessary, why, I think we can dispose of it while the conference is going on.

The Court: What do you think of that, Mr. Lasky? It is a little out of the ordinary. In other words, you will be closing your case—of course, it would not be to your prejudice—perhaps with some stipulations you contemplated would be agreed to not being agreed to. That would not be to your prejudice. You could put it on. Except, of course, you would be faced with the proposition of holding your witnesses continually available while the matter is disposed.

Mr. Lasky: That is right. They have been two weeks already. It is a wonderful idea to proceed and work all day today. I also say the stipulations that remain outstanding for the plaintiff's case require no trouble at all to dispose of. There are two short ones and then the one condensing the depositions, and yesterday counsel said to the best of his impression [396] those were true and correct condensations. So far as getting his own condensations of depositions and his own stipulations, if he wants part of next week to work on them, fine, but I think we ought to make progress.

The Court: I agree, Mr. Erskine, with counsel here, that we ought to decide the action on the stipulations that have been proposed here by Mr. Lasky. It seems to me they are all matters of fact, and you have your witnesses here. It seems to me it would take just a half hour to say, "Is this not true?"

Mr. Erskine: I have to check the Gassman and Lofendo stipulations against the depositions. I believe they are all right but I want to make that check. Perhaps I do not try cases properly but I have been spending a lot of time in preparing my cross-examination and in preparing my direct examination. As a matter of fact, I was up at five o'clock yesterday morning. I was up at five o'clock this morning. I was working until seven o'clock last night. I was working until seven o'clock the night before. I have been working hard at this case and I certainly am willing to cooperate and do everything in my power, but there is an end to my physical strength. I have no doubt that these stipulations are proper and that they will go in, but I must have a little time to consider them. I do not want to walk into some hooks, to use Mr. Lasky's expression. The Court has said the stipulations were in part my stipulations. It is true they helped me out, but it [397] is also true that they are part of his case and not stipulations of my own.

The Court: Oh, yes. [398]

Mr. Lasky: I have no doubt, but I will be at your service night or day on those. Now we have outstanding in the way of stipulations one which is two pages and about eight lines, and all that I recalled counsel held it up for was a revision of a word or two in two paragraphs. I revised one paragraph according to the agreement, and it seems to me that it could be taken care of. Now the other morning in chambers counsel brought up a pro-

posed stipulation having to do with our commercial ledger sheet, and he was going to get some figures, and I have waited for him to prepare it. We were also interested in continuing the stipulation showing connection between one ledger sheet and another, and I have now finally taken it upon myself to prepare that part of the stipulation, which I will give counsel here a draft of at this time, and which follows as closely as I could remember it, word for word, what we talked about that morning. It is about two and a half pages. It doesn't take the place of that portion which he was going to draft and I still await that, but I imagine that was for his case. But for the Plaintiff's case, here is a two and a half page stipulation talking about those several ledger sheets, and I think on its fact it is patently correct, or if not, it is easily corrected.

Mr. Erskine: Well, let me see this, your Honor. I think that counsel is not as gracious as he might be. I have been trying to go along in this matter as much as I possibly can. He knows that he and I are not going to have any trouble about that [399] paragraph in that stipulation about the checks lying around the Branch. That doesn't depend upon the testimony of any of his witnesses, anyway; it depends upon the testimony of my witnesses. He knows that the Gassman and the Lofendo depositions are here, and that if we don't agree upon a summary of that testimony, he can introduce the depositions of Lofendo and Gassman. They are not here to testify. But I know we can go ahead on that. I made a suggestion that he permit me a

little time to deal with those matters, that he and I can get together, and if the court is here next week we can discuss any disagreement between him and myself on the subjects. But he insists that they go in right this minute. Now I don't think that that pressure should be brought to bear on me.

Mr. Lasky: I am sorry, I am not trying to bring pressure on you.

Mr. Erskine: After all, the fact remains, your Honor, that I will only have two days out of seven in which to present my case.

The Court: No, you are going to have all the days you need, Mr. Erskine. If it requires going over into the next week, if I cannot devote the time to next week, there will be the following week.

Mr. Erskine: Well, I am not going to do that. I want to get rid——

The Court: Your case is going to be given all of the time [400] it is necessary for you to use in the presentation of your testimony and evidence. There is no doubt about that. I am sorry if my continual urgings to speed up and that sort of thing have in any way impressed you with the idea that you are going to be limited in any manner, because you are not going to be. You are going to be given all the time you want. Of course I realize you might feel that way, but I want to disabuse your mind of it right now, because I want to get rid of this case and get out of here, don't let that influence you in whether or not you want to take additional time to do something.

Mr. Erskine: No, thank you.

The Court: There could be no prejudice against you on that basis, because I realize that you have to protect your client. You have to do everything possible to present your case. I have had too much experience, Mr. Erskine, with Judges who attempt to try cases and force attorneys to try cases the way they want them tried. I have had my full share of experience with judges of that nature, and I don't intend to be one myself if I can help it. You are going to try the case you want to try; but my position has been one of continually urging you to get together on these matters, to speed up the matter, because I do naturally want to get home to my family. I want to stop living at my expense to do Government's work and your work down here.

Mr. Erskine: I certainly want to help the Court in achieving that, and I will do the very best I can. [401]

The Court: Now you will have all the time that you need. But now on these stipulations, however, with reference to most of those facts, isn't Mr. Tobey there familiar, doesn't he know the whole history of the case sufficiently for you to sit down with him and read this stipulation over and say, "Is it or is not so?"

Mr. Erskine: Yes. Well, it is just in that one stipulation, it is just correcting that paragraph about the checks lying around the Bank. I think Mr. Lasky himself could do that.

Mr. Lasky: I have rewritten that. In fact, I rewrote it tentatively this morning, hoping we could take care of it. I rewrote it to say, "These checks

were neither rejected nor paid and were not charged against the account, but were physically kept at the Branch until November 18th." Then I threw out that line later on, and over here, "which had been at the Branch," instead of "lying around." "Which had been at the Branch." Now I corrected that line which so it is——

Mr. Erskine: That sounds as though it will be all right with me. Just a second.

(Discussion between Mr. Erskine and Mr. Tobey out of hearing of the reporter.)

The Court: Well, I think maybe, gentlemen, fifteen minutes or so in Chambers might do us some good to decide just what we are going to do. Court will stand in recess. Come into Chambers.

(Recess.) [402]

Mr. Lasky: At this time I ask that there be attached, for the record, to Plaintiff's Exhibit 14, which was a stipulation of the parties, a document entitled "Further stipulations," and counsel, you agree that we do stipulate to this document called "Further stipulations"?

Mr. Erskine: Yes.

Mr. Lasky: And that it may be part of Plaintiff's Exhibit 14.

The Court: Very well.

Mr. Erskine: That is right.

(Whereupon the document referred to above as further stipulations was received in evidence and attached as part of Plaintiff's Exhibit 14.)



Mr. Lasky: And in the body of the new addition I have inserted some Exhibit numbers, one being a document that has already been received in evidence as Plaintiff's 16 and I have marked the others as Plaintiff's Exhibits 19, 20 and 21, counsel. The rules and regulations of the Bank of America, Number 220, page 1, as Plaintiff's Exhibit 19.

The Clerk: Exhibit 19 in evidence.

(Whereupon Rules and Regulations of Bank of America No. 220, Page 1, referred to above, were received in evidence and marked Plaintiff's Exhibit No. 19.)

Mr. Lasky: And as Plaintiff's Exhibit 20, Rule 510.5, page 1. [403]

The Clerk: Plaintiff's Exhibit 20 in evidence.

(Whereupon Rule 510-5, Page 1, Bank of America, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 20.)

Mr. Lasky: And as 21, Rule No. 512, page 2.

The Clerk: Plaintiff's Exhibit No. 21 in evidence.

(Whereupon Bank of America Rule No. 512, page 2 thereof, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 21.)

Mr. Lasky: I won't read them to the Court, but my argument may refer to them for the purposes for which they are appropriate.

The Court: Yes.



Mr. Lasky: And now, Mr. Clerk, I think it might be well to staple this Further Stipulations onto the other.

The Clerk: Yes.

Mr. Erskine: May I proceed?

The Court: That comprises all of the stipulations that have now been agreed to, does it?

Mr. Lasky: They have been agreed to, to date, but, of course, one on Dean Howell's testimony. But I didn't want to break into the cross-examination on that.

The Court: Oh. Very well, you may proceed.

ALLEN R. LeROY

resumed the stand, previously sworn: [404]

Cross-Examination

By Mr. Erskine:

Q. Mr. LeRoy, I wanted to direct your attention first of all to your conversation with Mr. Duncan. You told him in that conversation, did you, Mr. LeRoy, at the beginning of it—among the first things that were said when you saw Mr. Duncan in the office of the Bank of America on the morning of the 18th—that your Bank had been swindled and was going to take a loss in connection with its transactions with United Produce Company, is that right?

A. That is right. [405]

Q. And isn't it a fact, Mr. LeRoy, that on the day prior to this—that is, on the day prior to

(Testimony of Allen R. LeRoy.)

November the 18th—you had a telephone conversation with Duncan?      A. Yes, sir.

Q. You called Duncan from Chicago, did you not?      A. Yes, sir.

Q. And the discussion between you and him over the telephone related to three checks that had been rejected by the Bank of America, of which the Merchandise Bank had received notice of rejection on the morning of November the 15th?

A. They had received the checks back, as I remember.

Q. Yes. But by the time you had your telephone conversation with Mr. Duncan, those checks were actually in the hands of the Merchandise Bank, is that right?      A. Yes, sir.

Q. On November the 17th?      A. Yes, sir.

Q. And you had a talk with Mr. Duncan about those checks over the telephone?

A. That is correct.

Q. And you told Mr. Duncan that you doubted that the Bank of America had any right to reject those checks, and it looked as though there had been too much delay in the rejection of them?

A. That is right.

Q. Now when you saw Duncan in the office of the Bank of America [406] on the morning of the 18th, you told him among the first things which were said what I have already stated: that is, that the Merchandise Bank had been swindled and had suffered a big loss in connection with United Produce transactions. That is correct, isn't it?

(Testimony of Allen R. LeRoy.)

A. I think so. I don't remember exactly the sequence in which it was introduced, but that was one of the first things mentioned.

Q. That is what I would like to get, as nearly as I can, Mr. LeRoy. I would like to get the sequence of this conversation as nearly as I can have you fix it. And the next thing that you talked about, or one of the immediate subjects of conversation, was the three checks which you discussed with him over the telephone on the preceding day. That is right, isn't it?

A. Well, that was one of the first things discussed, yes.

Q. Yes. And at that time you told Mr. Duncan with respect to those three checks that you believed that the Bank of America had acted in time in rejection of them, didn't you?

A. After his explanation was given to me, I told him that it appeared that they were in their time limit for returning them, although it was very bad correspondent bank service.

Q. In other words, Mr. Duncan explained to you what had been done with respect to the routing of the checks and the presentation of them?

A. Yes, sir.

Q. And after he had finished his explanation of that, you told [407] him that it appeared that the Bank had rejected them in time, although it didn't look to you like good correspondent bank service?

A. That is the way I remember it, sir.

Q. Now you didn't mention this particular de-

(Testimony of Allen R. LeRoy.)

tail that we are now discussing yesterday in your testimony with respect to what your conversation with Mr. Duncan was, did you, Mr. LeRoy?

A. I don't quite under the question.

Q. You didn't refer—I will withdraw that.

In testifying yesterday, you told us what the conversation was between you and Duncan, did you not?

A. I did.

Q. On the morning of November the 18th?

A. I did.

Q. And you didn't refer to this matter of the routing of those checks and rejection of them, the three checks?

A. No, sir. I did not.

Q. Now——

Mr. Lasky: If the Court please, as a matter of, I might say, personal privilege, the question to the witness asked him to confine his attention to certain matters and asked for the conversation on that subject.

Mr. Erskine: I think you asked him about the conversation.

Mr. Lasky: I asked him if anything else was discussed and he said yes, and I didn't even ask him about the rest of the [408] discussion.

Mr. Erskine: I think, though——

The Court: It was asked if other matters were discussed, and he said yes, as I recall the testimony.

Mr. Erskine: It makes no difference.

The Court: It is in the record.

Mr. Erskine: I just wanted——

Mr. Lasky: Well, I didn't want the impression

(Testimony of Allen R. LeRoy.)

to be created that the witness deliberately didn't talk about something. It wasn't asked of him.

Mr. Erskine: Of course the Court will understand I am not just beating on the rock. I have a purpose.

The Court: Yes, I understand what you are doing.

Q. (By Mr. Erskine): Now, Mr. LeRoy, you and Mr. Duncan discussed at that time—before I come to that, let me just check this first. You and Mr. Duncan discussed the fact that several Lofendo checks had been received at your bank—not several, probably a good many Lofendo checks had been received at your bank—and you wanted to find out the fate of those checks. Do you remember that?      A. Yes, sir.

Q. And at that time, you had with you, did you not, a list of the Lofendo checks? Is that right?

A. Yes, sir.

Q. And you told Duncan that you were anxious to get those checks [409] back, is that right?

A. Yes, sir, and to determine the fate of them.

Q. And to determine the fate of them. And in that connection, you and Duncan went over to the central office of the bank, did you not?

A. Yes, sir.

Q. And you had a talk with a man by the name of McGoff over there?

A. As I recall it, that was the gentleman's name.

Q. And you and Duncan told McGoff that you

(Testimony of Allen R. LeRoy.)

had this list of checks and that you wanted to find out where the checks were located and determine their fate, is that right?      A. Yes, sir.

Q. And you asked McGoff to make an investigation to find out where those checks were, is that right?      A. That is correct.

Q. Now are you quite clear, Mr. LeRoy, that in that morning's conversation with Mr. Duncan you discussed with him the six checks, that is, the advice of credit relating to the payment of the six checks?

A. I am, sir.

Q. You mentioned you and Duncan discussed the rejection, whether or not the Bank of America had rejected the three checks in time, and you also discussed the fate of the Lofendo checks in the morning, did you not? [410]

A. That is correct.

Q. And you also, according to your recollection, discussed the advice of credit relating to the six checks?      A. Yes, sir.

Q. Now as I understood your testimony, you told Duncan in your conversations with him in the morning or the afternoon, during that day, before you and he saw Johnson, that the six checks had not been paid, that the advice of credit had been sent out in error, is that correct?

A. Yes, sir.

Q. And later on you had a conversation with Johnson, did you?      A. Yes, sir.

Q. And I will ask you whether or not it is a fact that you told Johnson in that conversation that

(Testimony of Allen R. LeRoy.)

a clerk in your bank had mailed the advice of credit by mistake and that it should not have been mailed?

A. That is what I advised him.

Q. That is what you told Mr. Johnson?

A. That is right.

Q. Now about when in the afternoon did you have your conversation with Mr. Johnson?

A. I would say about three o'clock.

Q. And you were accompanied by Duncan?

A. That is correct, sir.

Q. And you and Johnson and Duncan had a conference at that time? [411]      A. Yes, sir.

Q. Did Duncan, before you and he went down to see Johnson, tell you that he wanted to find out from Johnson as one of the attorneys for the bank in the legal department of the bank, whether or not the Bank of America legally could return the Lofendo checks without their actual physical presentation at the branch of the bank on which they were drawn?

A. Do you mean the checks concerning which I was inquiring as to their fate?

A. That is right.

A. Yes, he said he wanted to determine from Mr. Johnson whether or not they could be withdrawn from the transit route.

Q. Without their physical presentation at the branch?      A. That is correct.

Q. And Duncan told you that that is why he wanted to consult with Johnson?



(Testimony of Allen R. LeRoy.)

A. One of the reasons.

Q. Then you and he went down to Johnson's office in the building in which the main office of the bank is situated. That is correct, isn't it?

A. We went to his office. Whether it is up or down, I don't recall, sir.

Q. Now when you got down there, it is true, is it not, that Duncan outlined to Johnson the situation in which you were interested as Duncan understood it? [412]

A. Yes, sir.

Q. Duncan told Johnson at that time that the Merchandise was to take a large loss in its business transactions with the United Produce Company, is that correct?

A. Correct. He said it appeared that they would, from what I had advised him.

Q. And he told Johnson that he wanted to help out; he wanted the Bank of America to help the Merchandise Bank in the situation, as far as the Bank of America could help them?

A. That is correct.

Q. Then there was a short discussion with respect to the right of the Bank of America to return the Lofendo checks without their presentation at the branch, was there not?

A. Not much of a discussion with respect to that point, as I remember it.

Q. Yes. Mr. Duncan asked Mr. Johnson whether or not the Bank of America could return the Lofendo checks to you without physical presentation to the branch, and Mr. Johnson replied that he

(Testimony of Allen R. LeRoy.)

thought that the Bank of America could do that provided the Bank of America received some sort of authorization from the Merchandise Bank authorizing it to do so?

A. That is my impression of what Mr. Johnson said, yes. [413]

Q. Then, in that conversation there was a discussion with respect to the advice of credit; that is correct, is it not?

A. Yes, sir.

Q. And Johnson was told by either you or Duncan—I forget which it was according to your statement—that the advice of credit had been sent out in error because the checks had been charged against fictitious credits, is that right?

A. That was substantially the statement.

Q. That was made by you or Duncan? Which one?

A. I can't recall. Perhaps by both of us. I don't know. If it makes any difference, I will say I said it.

Q. It might have been said by either one of you, is that correct? It was at that time and in that connection that you told Johnson that a clerk in your bank had mailed the advice of credit by mistake when it should not have been mailed, is that right?

A. That is correct.

Q. Mr. LeRoy, did you tell Johnson at that time that the Merchandise Bank wanted to revoke that advice of credit?

A. I said we had revoked it.

(Testimony of Allen R. LeRoy.)

Q. You said you had already revoked it, is that right?      A. Yes, sir.

Q. Was there a discussion between you and Johnson at that time as to whether or not the Bank of America had the legal right [414] as against Lofendo to consent to the revocation of that advice of credit?

A. I don't recall that point being raised.

Q. Will you testify that according to your best recollection, there was no discussion along that line?

A. I don't recall it. If there was it made no impression on me.

Q. Isn't it a fact that when the point was raised, you told Johnson what you previously told Duncan, that the Merchandise Bank had been swindled by the United Produce Company, and that Lofendo was in on the swindle, and that the Bank of America did not have to pay any attention to Lofendo?      A. I do not recall that.

Q. Will you state that nothing of that sort was said?

A. Not to my recollection. I do not recall the point being raised.

Q. Isn't it a fact that when you and Johnson and Duncan were discussing the revocation of the advice of credit that Johnson said to you that he, like Duncan, would do anything he could to help out the Merchandise Bank in its trouble, but he did not want to do anything to hurt his own bank, the Bank of America?

(Testimony of Allen R. LeRoy.)

A. I do not recall his making that statement, no, sir.

Q. Will you say, Mr. LeRoy, that the statement was not made?

A. If it were made, it made no impression on me. I do not recall it, sir. [415]

Q. Isn't it a fact that after Johnson had said that to you, he said that he wanted to call up Estribou down at the branch for the purpose of determining the status of the account of Lofendo at the branch in connection with this matter of the revocation of the credit?

A. Certainly if I do not recall his making a statement to that effect, it was not after that statement. He did call—said he wanted to call the branch.

Q. I was not trying to tie the two statements together, Mr. LeRoy. I was passing on to a different situation. Before I do so let me refer to something here. Let me ask you again about that. I asked you, Mr. LeRoy, whether or not Mr. Johnson did not state to you in connection with the revocation of the advice of credit that he wanted to help out the Merchandise Bank in its trouble as much as he could?

A. I do not recall his making that statement. If he did, it made no impression on me. That was not the import that I got from his statement about calling the branch.

Q. I want to refer you to page 86 of your deposition and I *will* you, Mr. LeRoy, whether or you

(Testimony of Allen R. LeRoy.)

did not testify as follows when your deposition was taken from about the fifth line down:

“Q. Now, in that conversation did Mr. Johnson say to you and Mr. Duncan, after Mr. Duncan had outlined the situation to him, and after other discussions had taken place, that he believed that the Bank of America [416] should do everything it could to help out the Merchandise Bank?

“A. He was cooperative, yes.

“Q. Well, I am not asking you whether he was cooperative or not, Mr. LeRoy.

“Mr. Lasky: No.

“The Witness: Then I would answer, ‘yes’ to your question, yes.”

Did you give that testimony?

A. If it is in the deposition, I did, most certainly.

Q. I will ask you again. Using that testimony to perhaps refresh your recollection, isn't it a fact that Mr. Johnson, in that conversation, told you, after Duncan and you had outlined the situation which confronted you and him, that he would be willing to do whatever he could to help the Merchandise Bank?

A. Well, his actions certainly gave that impression. I would say the best answer to that would be the one I gave. He was cooperative.

Q. I am asking you if he said that to you?

(Testimony of Allen R. LeRoy.)

A. I do not recall his using those exact words, sir.

Q. Did he use words in substance like those?

A. It might be. He certainly was most co-operative.

Q. I paused to go back to that. Getting back to where I was, isn't it a fact that while you and Johnson and Duncan were discussing the revocation of the six checks, Johnson said in [417] substance that he did not want to give any advice respecting them until he found out what the status of the Lofendo account was, and therefore he wanted to call up Estribou, do you recall that being said?

A. I do not. That was not, according to my impression, the reason he called Mr. Estribou.

Q. Your best recollection is Johnson said nothing of that sort?

A. I do not recall his saying it now. He did say he wanted to know the status of the account.

Q. But he did say that, did he?

A. Oh, yes.

Q. And he said he wanted to call Estribou for the purpose of determining the status of the account?

A. In part, yes.

Q. And it is a fact, then, Johnson called up Estribou, is it not?

A. Yes, sir.

Q. And you heard Johnson's part of the telephone conversation, is that right?

A. Yes, sir, I had the opportunity. I was right there.

(Testimony of Allen R. LeRoy.)

Q. Do you recall whether or not Johnson asked Estribou over the phone with respect to the status of the Lofendo account?

A. I do not recall distinctly, I think that he did.

Q. Your best recollection is that he did, is that right?

A. I would say he probably did. [418]

Q. Then do you recall Johnson's saying to Estribou in that conversation that if the account was in the clear, that is, the Lofendo account, Johnson believed that Estribou could ignore the advice of credit?

A. I do not remember his saying anything to that effect, no, sir.

Q. You testify that he did not say anything of that sort?

A. Conditioning it on the Bank of America being in the clear, do you mean?

Q. Yes.           A. Yes, sir.

Q. He did not say anything of that sort?

A. Yes, sir.

Q. Mr. LeRoy, I will ask you this: When you asked Duncan to aid you in the location of the Lofendo checks and to aid you in determining the fate of those checks, you were asking for the help of Duncan as an officer of the Bank of America, were you not?           A. Yes, sir.

Q. When you asked Duncan and Johnson, and when you discussed with them the revocation of the credit, you were asking them also for the help of the Bank of America?



(Testimony of Allen R. LeRoy.)

A. In the return of the advice of credit but not in the revocation of it. That had already been done.

Q. When?

A. On the afternoon that Mr. Messenger telephoned to Mr. Estribou. [419]

Q. And then as I understand your testimony, when you were talking to Mr. Duncan and Mr. Johnson about the advice of credit, you were not asking for their help as officers of the Bank of America, were you?

A. In the revocation of the credit?

Q. No, when you were discussing the advice of credit with them and whether or not it should be entered, you were not asking them for their help in that connection, were you?

A. In the revocation of it?

Q. Not in the revocation of it, in your general discussions.

A. Certainly I was asking for their assistance.

Q. Certainly you were asking for their help in connection with the advice of credit, weren't you?

A. Yes, sir, and the return of it.

Q. Yes. Speaking generally, Mr. LeRoy, isn't it a fact that during your conversations with Duncan and Johnson their attitude with respect to your request was one of cooperation, helpfulness, that they wanted to help you; that is right, isn't it?

A. Certainly, yes, sir.

Q. And they both in fact told you that they wanted to help you as much as they could?

A. Yes, sir.

(Testimony of Allen R. LeRoy.)

Q. Now, tell me this, Mr. LeRoy: What did the Bank of America get for revoking the advice of credit?

Mr. Lasky: If the Court please, that is calling for the [420] witness' conclusion on the subject of consideration. The Court will have to pass on that, or whether it is even needed.

Mr. Erskine: It is proper cross-examination, I believe, if the Court pleases, on this ground: He was asking for their help, and my point is——

The Court: You mean did you give them anything for their help?

Mr. Erskine: Yes.

The Court: You can ask him that.

Mr. Lasky: Do you mean did he hand them anything?

The Court: Yes. That is a different matter.

Mr. Erskine: No, did the Bank of America get anything.

Mr. Lasky: That asks for his conclusion. He can testify to what he said and heard that day and what physically he did and they did.

The Court: Yes, whatever he gave them. He can only testify as to matter within his own knowledge, and then, of course, whether or not there was a revocation there, you are asking him to state a legal conclusion the Court is going to have to determine.

Mr. Erskine: That is doubtless so, but the witness has testified——

The Court: You can ask him whether he offered them anything.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: That they in effect made an agreement with him. Our position is, the Court pleases, that there was not in [421] the minds of these men, Johnson and Duncan, the idea of making any agreement. All that they were trying to do was to help this bank out that was in a jam.

The Court: You can ask him about, as to whether he gave them anything, offered them anything or anything of that nature. That is quite all right. The objection, as I understand it, went to the legal conclusion that was assumed in the question.

Mr. Lasky: Exactly. I have no objection to asking what he said or did.

The Court: Or gave him or offered him.

Q. (By Mr. Erskine): Did you offer to Mr. Johnson and Mr. Duncan anything at the time—that is, not to them personally but to them as officers of the Bank of America, and therefore to the Bank of America—anything of a valuable nature, Mr. LeRoy?

Mr. Lasky: Now, that again calls for a conclusion. What is of a valuable nature?

The Court: I think we need not worry about that. He will have to tell us what it is, and the conclusions as to whether it is of a valuable nature or not, the Court can determine. The use of the word by either counsel or the witness is not going to confuse the Court that much, I do not think.

The Witness: I did not, no, sir.

(Testimony of Allen R. LeRoy.)

Q. (By Mr. Erskine): Did you promise them anything? A. I did not. [422]

Q. After you talked with Johnson, you and Duncan returned to Duncan's office, is that right?

A. Yes, sir.

Q. Counsel in his direct examination of you called your attention to this Defendant's Exhibit 10, the letter of November 18th, and I think your testimony was, Mr. LeRoy, that that letter was dictated by you prior to the time you saw Johnson and was not transcribed until after your interview with him.

A. That is to the best of my recollection.

Q. After you and Duncan returned from Johnson's office the letter was prepared, is that right? It had been transcribed?

A. That is the way I remember it, sir.

Q. After you and Duncan had returned from Johnson's office, the letter had been transcribed, and you and he then read it, is that right, went over it?

A. That is the way I remember it, sir.

Q. And you signed it and delivered it to him?

A. Yes, sir.

Q. You delivered it to Duncan? A. Yes.

Q. Do you recall whether or not after the letter had been signed Duncan said to you that he would like to take this letter back to Johnson to have Johnson approve it? A. No, sir, I do not.

Q. Do you recall whether or not after the letter had been signed you and Duncan went back to

(Testimony of Allen R. LeRoy.)

Johnson's office so Johnson could [423] approve the letter?      A. No, sir, I do not recall.

Q. Would you say that those events did not occur? [423A]

A. No, I would not. I do not recall them, however.

Q. The letter, however, was signed and delivered to Duncan, is that right?      A. Yes, sir.

Q. And that completed your conversations with him, is that right?      A. Yes, sir.

Q. That is, your conversation respecting these business matters?      A. That is right.

Q. And as soon as that was done, you telephoned to Mr. Messenger, did you not?

A. I telephoned Mr. Messenger, and it is my impression I made the phone call from the Bank of America office, yes, sir.

Q. That is right. You made it from Mr. Duncan's desk, didn't you?

A. Or an adjacent desk there.

Q. That was about what time, San Francisco time?

A. Oh, I would say approximately four o'clock.

Q. Now, Mr. LeRoy, you now know that on November 18th, the Merchandise Bank rejected the checks presented to it through the clearings, checks of the United Produce Company, payable to Lofendo, which had been deposited with the Bakersfield Branch of the Bank of America?

A. I know now, yes, sir. [424]

(Testimony of Allen R. LeRoy.)

Q. And you now know, do you not, that the Merchandise Bank revoked those checks at about 1:30 in the afternoon of November 18th. You now know that to be a fact?

A. I have been advised on numerous and several occasions to that effect, yes, sir.

Q. And you now know and have been advised on numerous and several occasions that the man who rejected those checks aggregating the \$97,000 drawn by the United Produce to the order of Lofendo and deposited in the Bakersfield Branch, the man who gave the directions for the rejection of those checks was Messenger?

A. No, that I do not know.

Q. But in your telephone conversation with Messenger at four o'clock San Francisco time, on the afternoon of November 18th, from Duncan's desk in the Bank of America, did Messenger advise you that Messenger that afternoon or the Merchandise Bank had just rejected the checks which had been deposited to Lofendo's account in the Bank of America aggregating \$97,000?

A. No, sir, he didn't advise me.

Q. He did not mention it to you?

A. No, sir.

Q. When did you first find that those \$97,000 in checks had been rejected?

Mr. Lasky: I think that is outside the scope of the Direct Examination. I thought some of this was but this is [425] certainly getting pretty far.

The Court: Overruled. Proceed.

(Testimony of Allen R. LeRoy.)

The Witness: As I remember it, the next day, late in the afternoon.

Q. (By Mr. Erskine): Who told you that they had been rejected? A. Mr. Messenger.

Q. And at that time you called Messenger from Bakersfield, is that right?

A. That is correct.

Q. Did Mr. Messenger say that he had made any effort to reach you on November 18th, or at any other time for the purpose of advising you that the \$97,000 in checks had been rejected so that you could advise the Bank of America of that fact when you were discussing the revocation of Advice of Credit? A. No, he did not.

Mr. Erskine: Would your Honor permit me a very short recess?

The Court: Surely. The court will stand in recess until 11:30. [426]

Q. (By Mr. Erskine): Now, Mr. LeRoy, in your letter of November the 18th you say with respect to the \$113,000 that it was received; you say:

“The collection letter of the East Bakersfield branch \* \* \*,” then skipping, “contain the following checks of the United Produce Company, endorsed Lofendo (and then specifying the six checks) \* \* \* was received by us on November 15th, and in error, an advice of credit for the items was mailed on November 16, 1948.”



(Testimony of Allen R. LeRoy.)

In other words, that is what you in effect told Johnson and Duncan before you prepared this letter, that the checks had been mailed out in error?

A. Yes, sir.

Q. I mean that the advice of credit had been mailed out in error?

A. Advice of credit. Pardon me, sir.

Q. And I believe you testified upon your direct examination that you told Mr. Duncan when you were talking with him that the advice of credit had been sent out in error, had been mailed in error, because this had been charged against fictitious credits? A. Substantially that, yes, sir.

Q. And I believe you testified on your direct examination that you didn't tell Duncan in detail why the six checks had been charged against fictitious credits, but merely that the checks had been charged against fictitious credits and that therefore the advice had been sent out in [427] error? A. Yes, sir.

Q. Now the Lofendo checks which you wanted to locate when you were talking with Duncan include the checks marked Plaintiff's Exhibit No. 4 for identification in this case, do they not (handing to witness)?

A. Well, without checking with the letter and making a determination of the fact, I wouldn't know.

Q. Yes, well——

A. (Continuing): But I will assume that they are.

(Testimony of Allen R. LeRoy.)

Mr. Lasky: Well, if we need a stipulation on it, we can check the numbers in the letter against the numbers of the checks.

Mr. Erskine: Well, that is all right; it is just a preliminary question.

Q. At any rate, Mr. LeRoy, when you came out here to California, one of the things that you were supposed to do was to locate the whereabouts of Lofendo's checks similar to Plaintiff's Exhibit 4 for identification? A. That is correct.

Q. Now did you know when you came out here to California whether the checks, the whereabouts of which you were going to locate or try to locate, had been credited to the commercial account of the United Produce with the Merchandise Bank, or whether those checks had been received as checks of debtors, checks delivered to the Merchandise Bank, with remittance sheets, as checks of debtors of the United Produce Company on [428] account of accounts receivable?

A. I didn't know at that time how they had been received or what the status of it was.

Q. Do I understand you correctly to say that when you came out here you did not know whether or not those checks, the Lofendo checks which were the checks that you wanted to find, had been credited to the commercial account or had been applied on account of accounts receivable? You did not know that? A. No, sir.

Q. Well, what were the fictitious credits, then,

(Testimony of Allen R. LeRoy.)

Mr. LeRoy, against which the six checks had been charged?      A. Fictitious credits?

Q. Yes. You told Duncan, did you not, that the advice of credit had been sent out in error because the six checks had been charged against fictitious credits. That is what you have testified to, isn't it, sir?      A. Correct, sir, correct.

Q. What were those fictitious credits?

A. Largely checks of Lofendo payable to United Produce Company on the East Bakersfield branch. But I did not know what their status in the Merchandise National was. I knew there were a large number of checks, Lofendo checks, which would have to be charged back, and that they were fictitious.

Q. Well, now, Mr. LeRoy, if the checks had been paid or [429] delivered to the Merchandise Bank as checks of debtors to be applied on account of accounts receivable, those checks would not create any credits to the credit of the United Produce Company, would they?

Mr. Lasky: Just a moment, please. Now we are getting into, certainly, legal argument; but in any event, it is not cross-examination of this witness. He has testified that he made certain statements in California. Now the status of what went on in Chicago we have developed by stipulation, or will, and the conclusion to be followed from there, your Honor, will decide on the facts we stipulate to or on the evidence. But it is not cross-examination of this witness, to argue with him as to whether

(Testimony of Allen R. LeRoy.)

that kind of transaction would create the fictitious credits.

Mr. Erskine: Well, if your Honor will permit me to state the purpose of it?

The Court: Yes.

Mr. Erskine: The purpose of it is this: This witness has testified that he told Duncan and Johnson at the time he asked their cooperation, according to our view of the case, to have the credit revoked; that the six checks represented by the credit had been charged against fictitious credits. That is what he says he told these men.

The Court: Yes.

Mr. Erskine: Now, I want to show, first of all, that he [430] didn't know whether they had been charged against fictitious credits or not, and secondly, that they weren't charged against fictitious credits at all, and that therefore his statement to these men was not correct.

Mr. Lasky: Well, now, the witness has testified that at that time he did not know whether they had come in into the commercial ledger or whether they had come in in the loan department.

The Court: Yes, but, counsel, isn't Mr. Erskine entitled to find out what he meant by fictitious credits?

Mr. Lasky: Oh, I think so.

The Court: Well——

Mr. Lasky: If that is the situation.

The Court: Then he develops what were the

(Testimony of Allen R. LeRoy.)

accounts, how were they handled, what did he mean by fictitious credits?

Mr. Lasky: Well, if your Honor thinks it bears on that, I withdraw my objection. It just doesn't seem to me to be bearing on that.

The Court: That is the only purpose as I see it.

Mr. Erskine: That is the only purpose: "Were there any fictitious credits?"

Mr. Lasky: The precise question was to argue with him.

The Court: Well, of course whether or not there were fictitious credits might be a conclusion the Court is going to have to draw in the end, but you can examine this witness as [431] to what he meant by fictitious credits.

Mr. Erskine: Yes.

The Witness: May I ask to have the question repeated?

Mr. Erskine: Would you read the question, Mr. Reporter, please?

(Record read.)

A. Yes, they would.

Q. Would they be credited to the commercial account of the United Produce Company?

A. Not directly.

Q. As a matter of fact, Mr. LeRoy, the checks would be applied on account of the indebtedness of the United Produce Company to the bank; that is right, isn't it?

A. That is correct.

Q. Now, from time to time the United Produce

(Testimony of Allen R. LeRoy.)

Company would execute notes to the Merchandise Bank, would it not?      A. Yes, sir.

Q. And those notes would be secured by assignments of accounts receivable?      A. Yes, sir.

Q. And when United Produce Company would execute such a note to the Merchandise Bank, the Merchandise Bank would credit the proceeds of the note to the credit of the United Produce Company in the bank, in the commercial ledger of the bank?

A. That is correct. [432]

Mr. Lasky: Well, now, I don't want to repeat the objection, but I do wish to make the objection and ask that it run to this line as not being proper cross examination (a), and, (b) going into a field that we were stipulating on—what was done back in Chicago.

Mr. Erskine: I want to find out——

Mr. Lasky: I won't argue the matter. I just make the objection.

The Court: This is a matter that you intended to stipulate upon, as to what the facts are as to how the account was handled in Chicago?

Mr. Lasky: Yes, that is right.

Mr. Erskine: That is correct, your Honor.

Mr. Lasky: That is what we talked about this morning.

Mr. Erskine: But I want to find out what this witness meant when he told these men that six checks had been charged against fictitious credits. That is what I want to find out.

Mr. Lasky: He has said already.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: Well, he hasn't stated it to my satisfaction. I know that you would like to shut me off on this, Mr. Lasky, but I would like to go ahead with it as proper cross-examination.

Mr. Lasky: Your Honor, assign that statement that I would like to cut him off as misconduct. I have no desire to cut counsel off. [433]

The Court: Well, counsel, we are not going to get into any discussion like that. Things have gone along too nicely here for us to argue about things like that. It was not intended as any reflection upon you personally.

Mr. Erskine: Part of your technique.

The Court: Of course every lawyer wants to shut off the other side's case when he feels he has a proper objection. Now we are not going to fight about these matters. I am going to permit counsel to examine along that line for whatever it is worth.

Mr. Lasky: Yes, and I merely made the objection so it would be in the record. I didn't propose an argument.

The Court: Surely; I understand your position. Proceed.

Mr. Erskine: What was the last question? Would you read that, please, Mr. Reporter?

(Record read.)

Q. (By Mr. Erskine): Now I think just to go back here a moment, Mr. LeRoy, I think I may have asked you this before, but I want to make sure: So when the debtors' checks were received,



(Testimony of Allen R. LeRoy.)

they were applied on account of accounts receivable, were they not?

A. Yes, sir, and endorsed on the——

Q. They were endorsed by the debtors and applied on account of the accounts receivable?

A. That is correct. [434]

Q. And when any such check was rejected by the bank or was rejected upon presentation to the bank on which it was drawn, then the payment that that check had represented turned out to be a false payment and as no payment. That is correct, isn't it?

A. That is correct.

Q. And so the effect of the rejection of the check was to leave unpaid, the balance, the indebtedness of the United Produce Company to which the check had been applied?

Mr. Lasky: Isn't that calling for a legal conclusion? It is the same thing.

Mr. Erskine: It is for the same purpose, to find out what he meant.

The Court: Well, yes, you are right; but in certain matters, counsel, you can't draw a line like that. The witness is testifying as to the handling of the account, and of course as to whether or not it reduced the indebtedness or not, ultimately that becomes a question for the Court to decide, if it is material. Now he is testifying as to what the operation shows in the bank itself, as he understands it. I don't think that we need—I will overrule the objection. It is one of those matters that you can't

(Testimony of Allen R. LeRoy.)

so segregate the fact from the conclusion as to eliminate the conclusion.

Mr. Lasky: All right.

The Witness: I am sorry, but I would like to have the question repeated. [435]

Mr. Erskine: Would you read it, Mr. Reporter, please?

(Record read.)

A. Unless there were funds in the commercial account to which the check could be charged.

Q. Well, without coming to that step of charging the check against funds, the immediate effect of the rejection of the debtors' check applied on account of accounts receivable was to leave unpaid the indebtedness of the United Produce Company to the bank in the amount of the check?

A. No, sir, not the immediate effect.

Q. What is that?

The Court: Is this going to be covered by stipulation? This is part of the——

Mr. Lasky: Yes, your Honor.

The Court: ——operation of how the account was handled in the Merchandise Bank that was to be covered by stipulation?

Mr. Lasky: The very subject of a stipulation.

The Court: Yes.

Mr. Lasky: I submitted to counsel this morning that matter, and he said that he himself was working on it and wished to defer our discussion on that

(Testimony of Allen R. LeRoy.)

until a subsequent time. That is the whole substance of that.

The Court: Now what this witness understands as to what the effect would be of that kind of an operation is of no value to us, is it? [436]

Mr. Erskine: Well, I think it might have some bearing upon his credibility. He tells these people to induce them to cooperate, let's say, in the revocation of credit, that the credit of the six checks were charged against fictitious credits; when, according to my understanding, as a banker he knew very well indeed at that time that the checks had not been charged against fictitious credits. I want to show his knowledge of the situation at the time he made that statement to these men.

Mr. Lasky: The witness has already testified that he didn't know—I mean, the——

The Court: That he didn't know the status.

Mr. Lasky: That he didn't know whether these checks had come directly into the commercial ledger or had come into another department. He has already said in his mind they were still fictitious credits. Now the procedure and legal consequence of how it was handled will be covered by stipulation, and the legal consequences will be eventually determined, if it is an issue in the case, by the Court. Now, I don't see how examining the witness on this subject bears on his credibility.

Mr. Erskine: I think it has that bearing.

The Court: You think it does? Well, if you think so, proceed.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: I am almost finished with it, your Honor. We will pass along to something else in a moment. [437] (To reporter): Would you read that last question?

(Record read.)

Mr. Erskine: Well, let me put that question to you again, Mr. LeRoy.

Q. Do you want the Court and counsel to understand that in your opinion as a banker, talking about fictitious credits, when a debtors' check delivered to the bank for application on account of accounts receivable was rejected, the effect of that rejection was not to leave unpaid the indebtedness of United Produce Company to the bank in the amount of the check?

A. Not the immediate effect. The first operation would be to charge it back to the commercial account. [438]

Q. Do you want us to understand that you charge the commercial account of the customer, and obligation of the customer to the Bank which you believe has been paid?

A. Frankly, I do not understand your question, Counsel.

Q. Well, I don't blame you. When did these Lofendo checks, the whereabouts of which you were trying to locate—when were they charged back to the commercial account of the United Produce Company with your Bank?

A. Do you mean when they were received by us?

Q. When were they charged back against the

(Testimony of Allen R. LeRoy.)

account? A. Upon their return to the Bank.

Q. When they were returned?

A. Yes, sir.

Q. Which was that November 18th?

A. Yes, sir.

The Court: That is a matter that is going to be covered in a stipulation.

Mr. Lasky: I had not known it was, but I will be glad to insert this in the stipulation, when these checks returned here from the Bank of America and when they went on the ledger sheets and the entries of reversal made. Those are physical facts.

Mr. Erskine: They are much more than physical facts; they are legal facts.

Mr. Lasky: All right, legal deductions may follow from them or may not. [439]

Q. (By Mr. Erskine): Mr. LeRoy, this still bears on the subject of fictitious credits. You are aware of the fact that the Merchandise Bank received a collection letter accompanying four checks from the East Bakersfield Branch, four checks aggregating 89,000 dollars about November 13th?

Mr. Lasky: I object to this. It certainly is outside the scope of Direct Examination, getting into another collection matter never referred to on the Direct Examination.

Mr. Erskine: I still want to cover this one point, which relates to what he meant by fictitious credits, if the Court please.

The Court: The importance of that, if you at-

(Testimony of Allen R. LeRoy.)

tach importance to the fact, the reason assigned for revoking the credit.

Mr. Erskine: That is right.

The Court: Does it make any difference what reason is assigned for the revoking of credit? If the Bank has the right to revoke, does it make any difference what reason it assigns for it?

Mr. Lasky: I do not think it makes any difference at all. It is our position that all of this is immaterial.

Mr. Erskine: If they are going to abandon their contention that there was an agreement between Johnson and Duncan on one side and the Merchandise Bank and LeRoy on the other that the advice of credit should be revoked, if they are going to abandon that contention, then I will abandon this examination. [440]

Mr. Lasky: I was not abandoning that contention. My objection was merely that this is going into a collection letter at a previous time concerning all of which there is no litigation.

The Court: Do I understand the contention is that there had to be an agreement to revoke?

Mr. Lasky: Oh, no, we do not contend there had to be. In my opening statement I said there was, but we consider it icing on the cake. We consider our rights would be just as good on a straight unilateral revocation, but in fact we have the other. That is our position.

The Court: I see.

Mr. Erskine: My contention, your Honor, is that

(Testimony of Allen R. LeRoy.)

they rely on the agreement, whether it is icing on the cake or part of the cake itself, and this gentleman's representations to our officers that induced the making of that agreement are therefore material, very material.

The Court: Very well, proceed.

(Last question was read.)

A. I know it now, yes, sir.

Q. (By Mr. Erskine): That letter was received by the Merchandise Bank according to my information——

Mr. Lasky: The stipulation put in this morning by the Bank of America refers to the Collection Letter. It says it went out from the Bank of America on November 10th and it came back collected on some given day. I think it was the [441] 16th.

Mr. Erskine: When did the advice of credit go out, do you remember?

Mr. Lasky: I think you even put the advice of credit in the other day. It is in evidence. I think it went out on the 12th; that is what the evidence shows.

Q. (By Mr. Erskine): Showing you, Mr. LeRoy, Defendant's J, I ask you whether those are not advices of credit used by your Bank and sent by your Bank to the East Bakerfield Branch of the Bank of America on the date named there?

Mr. Lasky: It has been stipulated they are.



(Testimony of Allen R. LeRoy.)

Mr. Erskine: All right, that has been stipulated, they are.

Q. Now, Mr. LeRoy, when these advices of credit, Defendant's Exhibit J, were sent to the East Bakersfield Branch, the account of the United Produce Company with the Merchandise Bank was charged with the amount of checks referred to in them, were they not? A. Yes, sir.

Q. Were those four checks referred to in these papers here, Defendant's Exhibit J, charged against fictitious credits?

A. Yes, sir, in my opinion.

Q. Do you know whether the Merchandise Bank ever made a claim against the Bank of America for those funds?

Mr. Lasky: May I stipulate to it?

Mr. Erskine: Yes. [442]

Mr. Lasky: We never did, because the advice of credit was received by the Bank of America before we ever knew about it.

Mr. Erskine: I will take that stipulation of counsel as an answer to my question.

The Court: It is so stipulated.

Q. (By Mr. Erskine): I believe you testified, Mr. LeRoy, that in the morning of November 18th, when you and Duncan were talking, Duncan telephoned to the Fresno Branch of the Bank of America, is that right? A. Yes, sir.

Q. Are you quite clear that that was in the morning? A. As I recall it, yes, sir.

Q. You also testified that after you and Duncan

(Testimony of Allen R. LeRoy.)

had lunch together you returned to the Bank, is that right?      A. Yes, sir.

Q. And that Duncan then had another telephone conversation with Estribou?

A. Yes, sir, during the afternoon with the East Bakersfield Branch, at least. I understood it was with Mr. Estribou.

Q. Did Duncan have that conversation with Estribou in the afternoon before or after you saw Johnson?      A. Before, as I remember it.

Q. You have already testified that the letter of November 18th was signed and delivered after you saw Johnson; that is right, isn't it? [443]

A. As I recall, yes, sir.

Q. The conversation between Duncan and somebody in the East Bakersfield Branch whom you thought was Estribou took place before the conversation with Johnson and the letter was signed, was transcribed and signed after the conversation; that is right, isn't it?

A. As I recall it, yes, sir.

Q. Yesterday in testifying with respect to this second conversation (page 379 of the transcript, line 1) you were asked on page 378A, "Q. Will you relate what you can and what you can allocate to the second telephone conversation?"

And your reply was, "Yes, he told them that he had received a letter giving the list of the checks, and that a copy would be sent to them."

Now, as a matter of fact, when Duncan had that

(Testimony of Allen R. LeRoy.)

telephone conversation he had not received any letter, had he?

A. He may have said he was going to receive it. As I remember it, it had been dictated and was in the hands of the stenographer.

Q. Certainly at that time he had not received, had he? A. In my opinion, no.

Q. Mr. LeRoy, you testified that Mr. Duncan told you that Estribou had told him that the East Bakersfield Branch had been alerted by a communication from the Merchandise National Bank—alerted with respect to this account, is that right?

A. That was the gist of the conversation, yes, sir. [444]

Q. You are quite clear on that?

A. As I remember it.

Q. Do you know as of this time any communication from the Merchandise Bank to the East Bakersfield Branch which could have alerted the East Bakersfield Branch with respect to the Lofendo Account?

Mr. Lasky: This is asking for the witness' conclusion as to what letter in their files might have been construed by the East Bakersfield as an alert.

The Court: Yes, the objection is sustained.

Mr. Lasky: If there is such a document, we will argue it had that effect.

The Court: Yes, you may ask about specific letters or anything of that nature, but his conclusion as to which of the letters or communications is the one which alerted them, the objection is sus-

(Testimony of Allen R. LeRoy.)

tained to that. The Court will stand in recess until 2:00 o'clock this afternoon. [445]

Wednesday, June 21, 1950, at 2 P.M.

The Clerk: Merchandise National Bank v. Bank of America, on trial.

Mr. Erskine: I just have one more question of you, Mr. LeRoy.

Q. Mr. LeRoy, I want to find out if you told Mr. Duncan in your conversation with him on November the 18th, conversations with him, that you were anxious to get an answer to the Lofendo transactions, because "earlier in October we (that is, the Merchandise Bank) had noticed a volume of items going through there which made us suspicious, and had checked up to the best of our ability (that is, the Merchandise's ability) on the United books and obtained what appeared to be a satisfactory answer to your questions," but that in the light of disclosures made on the preceding day, November 17th, you wanted more information to determine whether or not there was a kiting operation. Did you tell Mr. Duncan that?

A. Substantially that, yes, sir.

Mr. Erskine: Well, that is all.

Mr. Lasky: No further questions, Mr. LeRoy.

The Court: Very well, you may step down.

(Witness excused.)

Mr. Lasky: Mr. Duncan.

Mr. Erskine: Pardon me. I understood, of

course, that I [446] have a right to recall Mr. LeRoy as part of my own case.

The Court: Oh, yes, yes.

Mr. Lasky: He will be here.

ROLAND T. DUNCAN

called on behalf of the plaintiff as an adverse witness, sworn.

The Clerk: Will you state your name to the Court, please?

A. Roland T. Duncan.

Mr. Lasky: Mr. Duncan is being called as an adverse witness under Rule 43(b).

The Court: Very well.

Direct Examination

By Mr. Lasky:

Q. Mr. Duncan, you are vice president of the Bank of America, are you not?

A. Berkeley Office, yes.

Q. Well, presently you are over at the Berkeley office?

A. That is right.

Q. But in November, 1948, you were assistant vice president in the Banks and Bankers Division of the Administrative Department at the headquarters office in San Francisco, correct?

A. That's right.

Q. And that is the division that has to do with relations with correspondent banks?

A. Yes.

Q. Do you recall that on November 18, 1948, Mr. LeRoy of the [447] Merchandise National Bank

(Testimony of Roland T. Duncan.)

called upon you at your office in San Francisco?

A. Yes.

Q. And at that time Mr. LeRoy told you, did he not, that his bank had sent out an advice of credit for \$113,000-odd to the East Bakersfield branch, that that had been sent out in error, that the checks involved had not been paid and that the advice of credit should not be acted upon when received?

A. He told me that on the 18th; on the 18th he told me practically that, yes.

Q. Yes. And subsequently, during the day and in his presence, you telephoned to your East Bakersfield branch?

A. I telephoned East Bakersfield. Whether Mr. LeRoy was there or not, I am not sure. But I did telephone.

Q. Well, Mr. LeRoy saw you in the morning and he saw you again in the afternoon, did he not?

A. That's right.

Q. And you two had lunch together this day?

A. I didn't recall it, but he says we did, and I guess we did.

Q. But in any event, it was sometime during the course of the day and sandwiched in between conversations with Mr. LeRoy that you you did call Bakersfield, East Bakersfield?

A. Yes, I did.

Q. And you had a telephone conversation with one of the officers of the East Bakersfield branch, did you not? [448]

A. Yes, I did.

(Testimony of Roland T. Duncan.)

Q. Who was it, was it Mr. Estribou?

A. On the 18th, I don't know whether it was Estribou. I know I did talk to Mr. Tarr.

Q. All right, and at that time in the conversation, Mr. Tarr, told you, did he not, that Merchandise National Bank had had a telephone conversation the previous day telling his branch not to act on the advice of credit, that it had been sent out in error, that the checks had not yet been paid? Mr. Tarr told you that?

A. No, I wouldn't recall that.

Your Honor, I made a memorandum shortly after this transaction, and I would like to be able to refer to it to recall my memory, if I may.

Q. (By Mr. Lasky): Now with respect to that memorandum, I will ask you a few questions about that before you refer to it. That memorandum that you refer to was not made by you until December 1st, 1948, is that right?

A. That is when it is dated, yes.

Q. Which was about two weeks after your conversation with Mr. LeRoy?

A. Approximately.

Q. And you did not make that memorandum until you had been advised that it looked like a lawsuit was pending with Merchandise National Bank?

A. No, that is not true. [449]

Q. You knew at that time that Merchandise National Bank had already made demands for the return of the money on deposit with your bank?

A. I might have.



(Testimony of Roland T. Duncan.)

Q. Had you not been told before you made the memorandum that Mr. LeRoy had come back to see Mr. Schilling with an attorney representing the Merchandise National Bank?

A. I knew that he had come back and had seen Mr. Schilling, yes.

Q. So that when this memorandum was made two weeks later, you already anticipated that something was about to happen in the way of a litigation?

A. Not necessarily, no.

Q. You made the memorandum in anticipation of——

A. No, I made it in anticipation, in the normal procedure of my operations.

Mr. Lasky: I suggest, if the Court please, that I be permitted to interrogate the witness without the benefit of his memorandum, and when I have exhausted his memory on the subject, he has a right to refer to it.

The Court: He has no right to use a memorandum in any event until his memory has been exhausted.

Mr. Lasky: Yes.

Q. Now, getting back to the question I asked you just a moment ago, did Mr. Tarr tell you in the phone conversation that Merchandise National Bank had a telephone conversation the [450] previous day with Tarr's branch, telling them not to act on the advice of credit that had been sent out in error, and that the checks had not yet been paid? Do you remember that?

(Testimony of Roland T. Duncan.)

A. He could have told me that, yes.

Q. Well, I call your attention to your deposition—Counsel, page 53. Your deposition was taken in this case? A. Yes.

Q. And I read you at line 15:

“Tarr, as I recall it, told me of the telephone call that they had the previous afternoon from the Merchandise National Bank asking them not to act upon an advice of credit which they said had been sent out in error, and that the checks involved under their collection had actually not been paid. And he told me at that time that, as I recall it, they had not as yet received the advice of credit.”

You testified to that, of course, at the time?

A. I testified to that.

Q. Which was about six months ago?

A. Yes.

Q. Your memory was better at that time than now?

Mr. Erskine: Well, now, counsel, I think that the deposition shows that he was testifying from his memorandum. “Let the record show that I am showing the witness the memorandum again,” on line 5 of page 53. [451]

Mr. Lasky: It doesn't make any difference. The record may show that he was testifying from his memorandum.

Q. In any event, that is correct, is it not?

A. That I testified to there? Yes.

(Testimony of Roland T. Duncan.)

Q. Yes. And you recall that you and Mr. LeRoy called on Mr. Kenneth Johnson of your legal department sometime during the course of the November 18th?

A. We did.

Q. And at that time it is a fact that Mr. LeRoy did tell Mr. Johnson, is it not, that Merchandise National Bank had in error sent out an advice of credit covering \$113,000-odd of checks that had been sent out by East Bakersfield to Merchandise for collection, that the checks had not been paid, that the advice of credit had been sent out in error and that Bank of America was to disregard the advice when it got it and not act upon it?

A. In substance, yes.

Q. Yes. And also that East Bakersfield branch was not to make entries or accept the advice of credit when received?

A. He requested that, yes.

Q. Yes. And he said, did he not, Mr. Duncan, that his bank expected your bank not to act on that advice of credit?

A. He was asking us not to act on the advice of credit.

Q. Yes. He said that they expected you would not do so?

A. Whether he expected us to do so or not I wouldn't know. [452] He stated it that way.

Q. Well, that is the substance of it, was it not?

A. That is the substance.

Q. Without searching your memory for the exact words?

A. Yes.

(Testimony of Roland T. Duncan.)

Q. And then it is a fact, is it not, that Mr. Johnson in the presence of you and also in the presence of Mr. LeRoy did telephone to Mr. Estribou?

A. He did.

Q. And talked about the \$113,000?

A. Part of it, yes.

Q. Yes, sir. And it is a fact that he told Mr. Estribou in that telephone conversation that the Bank of America was to follow LeRoy's instructions on the subject of the advice of credit?

A. No, I wouldn't say that.

Q. Did he not say that?

A. Not to definitely follow them, no.

Mr. Erskine: I can't quite hear you.

The Court: "Not to definitely follow them, no."

Mr. Erskine: Thank you.

Q. (By Mr. Lasky): I show you here a letter that has been marked in evidence as Plaintiff's Exhibit No. 11. Will you look at that, please? That is your signature, is it not?

A. That is right. [453]

Q. You remember writing that letter?

A. Yes, I do.

Q. That day? A. Yes.

Q. And mailing it? A. Yes.

Q. Now you notice this statement:

"During our telephone conversation this afternoon with Kenneth M. Johnson, assistant counsel of your legal department, you were informed of our bank's position in this case, namely, we must recognize their instructions."?

(Testimony of Roland T. Duncan.)

A. That's right.

Q. Now refreshing your memory from that letter which you wrote shortly after the telephone conversation—is that right?

A. Later in the afternoon.

Q. Yes. Refreshing your memory from that letter, then, it is a fact, is it not, that Mr. Kenneth Johnson in the phone conversation with Mr. Estribou did tell him that the Bank of America was to follow LeRoy's instructions?

A. He told him that they, that we wanted to assist LeRoy in every way that we could in connection with that advice of credit, and he wanted Estribou's cooperation in doing it if he possibly could.

Q. Will you explain how it happens that you do not put those qualifications or you did not put the qualifications in that [454] letter which you wrote immediately thereafter?

A. We wanted the full cooperation from Estribou that we could possibly get in doing anything possible to save what might be losses as far as the Merchandise National were concerned.

Q. You wanted to—had you finished your answer?

A. Save any losses which they might be involved in, in connection with this particular transaction.

Q. You wanted to cooperate with the Merchandise National Bank did you not?

A. Definitely.

Q. Merchandise National Bank at that time was a valued customer of yours, was it?

(Testimony of Roland T. Duncan.)

A. They were good customers of ours.

Q. They were carrying an affirmative balance with your bank of anywhere from \$300,000 to \$400,000 at any one time, weren't they?

A. I don't think it was quite that high.

Q. Well, it was certainly in excess of \$250,000?

A. From \$200,000 up.

Q. You considered that a very valuable account?

A. Good account.

Q. You wanted to retain the good will of the Merchandise National Bank? A. Naturally.

Q. Retain their business? [455]

A. Yes.

Q. Which was profitable to you?

A. I imagine so.

Q. You certainly told Mr. LeRoy at that time after investigating it throughout your bank in San Francisco and by telephone with East Bakersfield that the advance of credit had not yet been received, did you not?

A. Did I tell Mr. LeRoy that?

Q. Yes; did you not?

A. Not to my recollection.

Q. Your deposition, Mr. Duncan—Mr. Erskine, page 41, line 17:

“Did Mr. LeRoy ask you when he came in in the morning or did he ask you at any time during the day that he was there whether the advice of credit had yet been received by Bank of America?

“A. As I recall it, in the afternoon.

(Testimony of Roland T. Duncan.)

“Q. And when he asked you that, what did you do, if anything? A. Answered it.

“Q. What did you tell him?

“A. As I recall, I told him that it hadn’t been received.”

Now that is the fact, is it not? You did so tell him?

A. If I told him that, from that deposition, yes, in the afternoon. You state that I was told by Tarr and by telephone [456] conversation that it hadn’t been received. Then I recited to him that it hadn’t been received.

Q. Well, of course, Mr. Duncan, I am not telling you anything about the facts; I am asking you.

A. Well, that is what I said there in the deposition—that is it.

Q. And it is the truth as you recall it?

A. As I recall it, yes.

Q. Yes. Now after you remember typing your letter, writing your letter that we have just referred to, Plaintiff’s Exhibit 11, you also remember receiving from Mr. LeRoy this letter, which has been marked in evidence Plaintiff’s Exhibit 10 and which I show you (handing to witness)?

A. Yes, I do.

Q. Now, after you wrote your letter, Plaintiff’s Exhibit 11, is it not a fact that you took both letters to Mr. Kenneth Johnson and showed them to him?

A. I possibly did.

Q. Well, it is a fact that you did, is it not, ask him to look them over?



(Testimony of Roland T. Duncan.)

A. Well, as I say, I don't know whether I did. I was counselling with him and I no doubt would.

Q. Well, I call your attention to your deposition, page 44, line 23. I will go back to line 19, where I am referring to the letter: [457]

“Q. Did you dictate the letter?

“A. I must have.

“Q. And after you wrote it, what did you do with it?

“A. The usual procedure would be to mail it.

“Q. Did you show it to Mr. LeRoy before you mailed it?

“A. I don't recall, but I wouldn't be surprised if I did.

“Q. Did you show it to Mr. Johnson?

“A. I believe I did.

“Q. Did you say anything to Mr. Johnson about this letter?

“A. Not that I recall.

“Q. For what purpose did you tell Mr. Johnson you were showing it to him?

“A. It is the usual procedure if you are going to counsel on anything at all that you would follow through on the remainder of your transaction.

“Q. Did Mr. Johnson say anything about the letter to you?

“A. Not that I recall now.

“Q. Did he say it was all right to send it out? A. He must have.

“Q. You don't recall?

(Testimony of Roland T. Duncan.)

"A. I don't recall his exact words as to that.

"Q. Well, no, if you can't remember exact words, of course that is all right. But do you recall in substance what he said to you?

"A. No, I don't." [458]

You have no recollection at all of, after you showed this to Mr. Johnson, what he said about it?

A. No, I haven't, other than—— [458-A]

Q. (By Mr. Lasky): But you did show it to him?

Mr. Erskine: Wait a second. He did not quite finish his answer.

Mr. Lasky: All right, if he didn't finish it.

The Witness: Other than I must have showed it to him.

Q. (By Mr. Lasky): On November 17—that is the day before Mr. LeRoy arrived—you talked by telephone to both Estribou and to Tarr, did you not? A. I did.

Q. At that time both of them told you that they had been watching the account of Lofendo for some-time and had not been advancing anything against uncollected funds and were in the clear?

A. That was the substance of it, yes.

Q. On the morning of November 19th—that is the day after Mr. LeRoy was there—slightly before 9 a.m. Mr. Tarr telephoned you, did he not, from East Bakersfield?

A. As I recall he did, yes.

Q. By the way, dropping that for a moment,

(Testimony of Roland T. Duncan.)

when you talked to Mr. Estribou on November 17th, he told you that they had been concerned with the Lofendo account for sometime in the past, did he not?

A. My conversations with Estribou at any time were very short and brief. The comments that he made were to the effect that they had been concerned about the account, but so far as any [459] details are concerned regarding the items I was talking specifically about, they were carried on with Tarr. So my conversations with Estribou, were, you might say, just passing conversations because they were very brief.

Q. I understand that, but the fact is Estribou did tell you at least this much, that for sometime past they had been concerned with the Lofendo account and had been keeping a close eye on it?

A. In substance, yes.

Q. Getting back to the phone conversation you had with Mr. Tarr on the morning of November 19th early in the morning just about the time the bank opened, is that right?

A. We get there at eight o'clock, so any time after that.

Q. You get there earlier than lawyers get to work.

Mr. Erskine: Some lawyers.

Mr. Lasky: I accept the correction, Mr. Erskine, Mr. Erskine is a lark and I am an owl, I am afraid.  
The Witness: Yes, it was before nine o'clock.

(Testimony of Roland T. Duncan.)

Mr. Lasky: Tarr telephoned you?

A. That is right.

Q. He told you then that he had just received a wire from the Continental Illinois National Bank and Trust Company of Chicago stating that they were returning items totaling in excess of \$97,000 issued by United Produce Company, and that those revealed that the East Bakersfield Branch had accepted [460] these items for deposit on November 15th and had paid against them; do you remember that?

A. That is it in substance.

Q. He stated that they desired to act on the advice of credit in excess of \$113,000, is that right? They desired to act upon it?

A. They wanted to act upon the advice of credit, if they were going to accept those items back.

Q. But had not yet got it?

A. They had not yet got the advice. That is what he told me.

Q. He called you early in the morning and said on account of that wire from the Continental Illinois National Bank, they wanted to take advantage of the \$113,000 but they had not yet got the advice of credit?

A. As I recall it.

Q. What you did was to tell him to get in touch with this branch supervisor, didn't you?

A. Assistant branch supervisor.

Q. And his assistant branch supervisor was a man named Libby?

A. That is right.

Q. You told him to get in touch with Libby and find out what to do?

A. That is right.

(Testimony of Roland T. Duncan.)

Q. You said in turn you would go down and tell the whole story to Mr. Kenneth Johnson?

A. I most likely did. [461]

Q. And then you proceeded to tell several other people in the bank about it—Mr. Reed, the cashier——

A. Mr. Reed, the cashier.

Q. Mr. Kenneth Johnson? A. Yes.

Q. And several others, including Mr. Libby, who was in the head office at the time. That is all.

#### Cross-Examination

By Mr. Erskine:

Q. Mr. Duncan, in one of the questions that Mr. Lasky put to you he asked you whether or not, as I remember the testimony, LeRoy had told you to not act upon advice of credit. Do you recall whether LeRoy had expected or that he was requesting the Bank of America not to act upon the advice of credit? [462]

A. As I recall it, he was asking us not to act upon the advice of credit.

Q. He was requesting you not to?

A. Requesting us not to act upon it.

Q. LeRoy in these conversations with you was asking your help. He was not laying down any law to you, was he?

Mr. Lasky: That calls for the witness' conclusion as to the meaning of the conversation.

Mr. Erskine: I will withdraw the question.

The Court: Very well.

Q. (By Mr. Erskine): Mr. Lasky asked you

(Testimony of Roland T. Duncan.)

about your reasons for giving the instructions to Estribou or for writing the letter to Estribou in which you, in effect, instructed him—Do you have that letter?

Mr. Lasky: Yes (handing a document to Mr. Erskine).

Q. (By Mr. Erskine): Withdrawing that question, in this letter you say you were informed of our bank's position in this case, namely, we must recognize their instructions, and you were asked your reasons for doing that. What was your answer to that question? I hadn't quite got the reason that you gave.

A. My main purpose was to cooperate with LeRoy in doing what we possibly could to help in every way to eliminate what he had told me looked as if there was going to be a sizeable loss, and in cooperating we wanted to make it as emphatic with Estribou that we wanted him to do everything possible to give that [463] cooperation. Mr. LeRoy's letter contained more than just this advice of credit that you were talking about. There were other transactions involved.

Q. Before you wrote that portion of the letter which I have quoted did you have a talk with Mr. Estribou with respect to the status of the Lofendo account?

A. As I recall my conversation with Estribou——

Q. With Tarr? A. I did with Tarr, yes.

Q. What had you been told about the status of the account?

(Testimony of Roland T. Duncan.)

A. At that particular time Tarr told me the account seemed to be all in the clear and it looked as though they had a black balance.

Q. And did you tell that to Mr. LeRoy at any time?

A. I must have told him at the time I was talking to Tarr.

Q. Could that have been one of the reasons underlying the portion of the letter of November 18th to Estribou which I have quoted?

Mr. Lasky: I think I will object to that, asking him what was the reason for the statement in the letter.

Mr. Erskine: I think it is cross-examination. You asked him for the reason.

The Court: I think you asked him, didn't you, counsel, as to the reason why he had made the statement.

Mr. Lasky: If both the Court and counsel recall that I did, I withdraw my objection.

The Court: I so understood. [464]

Mr. Erskine: I have a note down here.

The Witness: May I have that?

The Court: I do not think it is a question, counsel, as to whether it could have been one of the reasons. I think it would be more in point if it was or was not one of the reasons.

Q. (By Mr. Erskine): Was it or was it not one of the reasons underlying the instructions or the statement quoted from your letter, that is, that Tarr



(Testimony of Roland T. Duncan.)

had told you at that time that the account was in the clear?

A. The account at that time was in the clear and they had a black balance and it looked to be from the way things were at that particular moment they were not going to suffer any loss at Bakersfield.

Q. Was that not one of the reasons?

A. That was one of the reasons, one of the main reasons.

Q. Mr. Duncan, to go over the story as briefly as we can so as to give a complete picture of it, did you have a telephone conversation with LeRoy on November 17th, the day preceding the day on which you saw him at the bank? A. I did.

Q. What was that telephone conversation about?

Mr. Lasky: I object to that as outside the scope of the direct and not proper cross.

Mr. Erskine: It is part of the circumstances of the conversation, your Honor, about which the witness was interrogated. [465]

Mr. Lasky: I asked him nothing about the subject matter of the conversation.

Mr. Erskine: I know, but do you want me to call Mr. Duncan back tomorrow or the next day or shall we go along and try to get rid of him today?

Mr. Lasky: If you put it on the basis of convenience and using him as your witness now on your case, it is all right with me.

Mr. Erskine: It is proper cross-examination, too.

The Court: I do not see how offhand it is proper cross-examination. It is a different conversation

(Testimony of Roland T. Duncan.)

and had prior to any conversation that was inquired into on direct examination.

Mr. Erskine: It leads up, it is preliminary to what took place on the 18th, your Honor.

The Court: If it is going to speed things up, I will overrule the objection. Proceed.

A. My telephone conversation that afternoon, Mr. LeRoy called me——

Q. (By Mr. Erskine): That is the 17th?

A. That is the 17th, to inform me that the Merchandise National were refusing to accept back three items that had been returned by our East Bakersfield branch, and the reason being what he considered and what their bank considered was unnecessary delay in presentation.

Q. That was your telephone conversation with LeRoy on the 17th? [466]

A. On the 17th.

Q. You saw him on the morning of the 18th at the bank in San Francisco?

A. On the morning of the 18th, when I was placing a telephone call for him in reply to his telephone conversation the previous afternoon, he walked into the office.

Q. Between the telephone conversation of the 17th and when you saw him on the 18th did you make inquiry about the three checks?

A. I had one of the officers check the routing of those three checks.

Q. When Mr. LeRoy came into to see you on the morning of the 18th what did he tell you in the first

(Testimony of Roland T. Duncan.)

place? How did the conversation between you and him begin, do you recall?

A. As I recall it, the first part of the conversation related directly to our telephone conversation of the previous afternoon, and that he had with him the three checks, and that there had not been a delay in the presentation of them, that they been routed properly, and the return was in order, and consequently they were going to accept the three items back.

Q. Now, I will ask you, Mr. Duncan, did you make a memorandum of your conversation with LeRoy relating to the incidents of November 17th, 18th and 19th?

A. Pencilled memorandums, which you always do, like telephone conversations and things of that nature—you would have to, because of the amounts, dates and names. [467]

Q. Did you later on after these dates dictate a typewritten memorandum of what had taken place?

A. I did.

Q. When did you dictate that, Mr. Duncan.

A. Well, from what it says there, December 1st, and it was dated December 1st.

Q. That is the date the memorandum bears, is it?

A. Dictated from pencilled memorandums and from memory at that particular time.

Q. Did you prepare that particular memorandum with a view toward this lawsuit or was it a part of the routine of your office to prepare such memoranda?

(Testimony of Roland T. Duncan.)

A. We prepared memorandums on every contact that we had at our office and every contact that we made in the field when we were out calling, and those went into the files. That was the only method we had of being able to keep everybody in the department informed as to what transpired between our correspondent relationships.

Q. It was part of your regular routine to prepare this memorandum?

A. Part of the routine.

Q. Did you dictate it personally?

A. I did.

Q. Did you consult with anybody when you were dictating it?      A. No. [468]

Q. Did you consult with anybody after the dictation was completed?      A. No.

Q. Did you prepare a draft, a proposed memorandum and then a final draft?      A. No.

Q. You accumulate these, and as time presented itself, you dictate a bunch of them at a time. That one happened to be December 1st. There might have been a half dozen others along with it.

Mr. Erskine: I will ask that this be marked for identification.

Mr. Lasky: If the Court please, before that——

Mr. Erskine: This is a preliminary question I am about to put to him, and then you can make your objection.

(The document referred to was thereupon marked Defendant's Exhibit P for identification.)

(Testimony of Roland T. Duncan.)

Q. (By Mr. Erskine): Showing you this Defendant's Exhibit P for identification, I will ask you, Mr. Duncan, was that the draft originally dictated by you or did you prepare on draft and then upon the basis of that prepare another?

A. No, just the one.

Q. This Defendant's P for identification is the draft as dictated?

A. As dictated for the file.

Mr. Erskine: Now, if the Court please, I believe the [469] witness can, if necessary, if his recollection is not clear without the memorandum, refer to the memorandum.

Mr. Lasky: Will the Court permit me one further question of the witness with respect to this memorandum?

Q. I asked you before whether it was not a fact that you realized that a lawsuit was coming when you prepared that memorandum, and I do not recall now what your answer was, but I want to direct your attention to page 50 of your deposition, Mr. Duncan, line 4:

"Q. Now, on December 1st, when you prepared that memorandum, had anybody advised you yet that Merchandise National Bank was protesting the debiting of the \$113,000 against its account?

"A. Oh, I might have been aware of it. I wouldn't recall."

(Testimony of Roland T. Duncan.)

and then that was changed when you signed the deposition to read as follows: "Yes, I knew of it."

It is a fact, is it not, when you prepared that memorandum you knew the Merchandise National Bank was protesting the debiting and charging of that \$113,000 item against its account?

A. I knew possibly it was protesting but I did not know there was going to be any legal action, which you mentioned to me before.

Q. But you did, of course——

A. I knew at that time it had been protested, yes. [470]

Q. The Merchandise National Bank, represented by an attorney, had already been in touch with your bank on the subject? A. That is so, yes.

Mr. Lasky: I submit to the Court the memorandum prepared after a controversy has arisen, a matter of two, two and a half weeks, is not a proper memorandum with which a witness is to refresh his memory.

The Court: I do not recall, counsel, the mere fact that the mere fact that the controversy has arisen and he knew it had arisen at the time he made the memorandum creates a situation that requires the Court to prevent the use of the memoranda.

Mr. Lasky: Of course, I may be in error of my understanding of the rules of evidence, but a document prepared in circumstances of such a character as to detract from the veracity or credibilty of the witness, prepared with an eye——

(Testimony of Roland T. Duncan.)

The Court: That is a different proposition though.

Mr. Erskine: It might go to the weight.

The Court: That is your theory of it. He has testified it was made in the regular course of his business. Now, all the facts surrounding it and the testimony he gives will then be weighed by the Court, and under all those circumstances, and the Court finds, after all the evidence is in, as to what the document was prepared for.

Mr. Lasky: Very well, but in the next place, of course——

The Court: He has to exhaust his memory [471] first.

Mr. Lasky: Yes, he ought to exhaust his memory.

The Court: Yes. He has not yet done that.

Mr. Erskine: What was the question?

The Court: I do not think there was a question. I think you just made the statment that from this point forward he could refer to the memorandum, but that is not so. [471A]

Q. As I understand the ruling of the Court, so I will be clear on the point, if you have a memory with respect to any fact for which a question calls, without reference to your memorandum you should state what your memory is; if you have any recollection with respect to such a fact, you can consult the memorandum if your memory is not present with respect to the fact. Now, Mr. Duncan, I will ask you whether or not at the time you first talked



(Testimony of Roland T. Duncan.)

to Mr. LeRoy there was any conversation between you and him with respect to a kiting operation going on in the Merchandise Bank in connection with this United Produce account and whether or not the Merchandise Bank was to take a loss in connection with that operation?

A. Yes, there was. The Merchandise Bank would take a loss and anticipated—as if there was going to be a loss, possible loss.

Q. Then, Mr. Duncan, there was a discussion with respect to the routing of the three checks, is that right, the presentation of the three checks?

A. That was brief. That was disposed of promptly, as far as those three particular checks that the telephone conversation had dwelled on the previous afternoon. Because Mr. LeRoy told me immediately——

Q. Well, I don't think you have got to tell us what the law is. Perhaps we will be able to find that out. But at any rate there was first of all the discussion with respect to that [472] subject?

A. Yes.

Q. Then was there anything said with respect to the location of certain checks which had been delivered to the Merchandise Bank?

A. Many checks, a number of checks.

Q. What was said with respect to that particular phase of the matter?

A. Mr. LeRoy had with him a number of memorandums including adding machine tapes and totals, pencil memorandums, covering various items; and

(Testimony of Roland T. Duncan.)

as he told me, that they had uncovered what they thought was a large scale kiting operation between the Produce Company and Lofendo, in Bakersfield, and possibly other accounts in other Banks in the East; and that he was primarily interested at this particular moment to find out the location and the present disposition of all these items that were somewhere in transit, if not already present at our Bakersfield Branch.

Q. And what did you say to that, Mr. Duncan?

A. I assured him that we wanted to help in every way that we possibly could—would certainly give him full cooperation and that we would endeavor to locate these items and find out where they were.

Q. And what did you do, what did you and LeRoy do with respect to that matter?

A. We visited our central office and saw Mr. McGoff down there, [473] asked him, gave him the background of the story, asked him if he would mind tracing these items. I don't know how many there were.

Q. You and Mr. LeRoy went down to this office?

A. Both Mr. LeRoy and myself.

Q. And talked to Mr. McGoff down there?

A. That is correct.

Q. And asked McGoff to try and find those items?

A. Find the present location of those items.

Q. What is that?

A. Find the present location of those items.

(Testimony of Roland T. Duncan.)

Q. Did you later get a report from McGoff on that subject?

A. During the afternoon we got a report from him.

Q. And did you receive the report?

A. As I recall it, I eventually got the report; whether I got it direct from McGoff or through one of our other officers. I think it came through Lou Allen, I am not sure.

Q. And did you communicate what you had learned on that subject to Mr. LeRoy?

A. I did.

Q. Now, Mr. Duncan, did you have a conversation with anybody in the Bakersfield Branch on November 17th?

A. I talked to both Estribou and Tarr on the 17th.

Q. That conversation related to the, whether or not the three checks had been properly presented or had been rejected in time, [474] I mean?

A. I phoned them after I had received the telephone call from Mr. LeRoy on the 17th.

Q. And to discuss that subject with them?

A. To discuss those three items.

Q. Yes. Now, did you have any other telephone conversations with Estribou or Tarr on the 18th, according to your best recollection?

A. I recall that I talked to Tarr. I might have talked to Estribou as well, but again, it was just brief. I talked primarily with Mr. Tarr.

(Testimony of Roland T. Duncan.)

Q. And what was your conversation with Mr. Tarr?

A. Tracing down some of these items which we had been tracing, which Ed McGoff had been tracing for us, to find out the present disposition of those, if they had been to Bakersfield, what the condition of the account was at that moment.

Q. Was anything said in that conversation with respect to the advice of credit for the six checks?

A. It could have been, yes.

Q. Now, after your conversation with Tarr, did you have a conversation with LeRoy?

A. Yes, he could have been right there at the desk as I recall.

Q. And what is your recollection as to what you told him? Did you tell LeRoy what Tarr had told you?

A. Told Mr. LeRoy that at the moment the account in Bakersfield [475] looked to be all in the clear, in the black, and they looked to be perfectly all right and no problem there as far as any loss was concerned.

Q. Now, later on in that afternoon, you and Mr. LeRoy saw Mr. Johnson?

A. That is correct.

Q. Mr. Kenneth Johnson?

A. That is right.

Q. Who was with the legal department of the Bank at that time, is that right? A. Correct.

Q. And you and Mr. LeRoy had a talk with Mr. Johnson at that time? A. We did.

(Testimony of Roland T. Duncan.)

Q. Can you tell us in substance what that conversation was, Mr. Duncan?

A. The conversation with Johnson was, Mr. LeRoy wanted to give me a letter of instructions relative to those checks that we had traced down, that Ed McGoff had traced down that morning.

Q. That is, the checks that McGoff was trying to find out where they were?

A. Yes. He wanted to give me a letter of instruction requesting us to return those checks directly back to Merchandise National without going to their destination for presentation. My request of Johnson was to find out our legal rights in returning items [476] that had not been presented at the Branch drawn on, and not protesting them. Mr. LeRoy wanted the items returned as rapidly as possible and without any further delay, and if we could stop them in San Francisco or stop them at any other point and return them immediately, they would be in their hands in Chicago, so that they could act upon them if necessary. And my conversation with Johnson was, could we accept a letter from LeRoy giving us instructions to return these items without having the items presented and protested in the Bakersfield Branch?

Q. Now, when you saw Mr. Johnson, you told him what you just stated, is that right?

A. That is true.

Q. And didn't you tell him anything with respect, in general, to the position of the Merchandise Bank in the United Produce situation?

(Testimony of Roland T. Duncan.)

A. We summarized what had transpired up to that point, and——

Q. What did you say in that connection?

A. Well, I told him of my conversation with LeRoy—I mean, with Tarr, that I had talked to them and the account was all clear, and——

Q. Did you say anything with respect to what LeRoy had told you about the loss by Merchandise in United Produce transactions?

A. That came into the conversation. I talked about that.

Q. What did you say about that?

A. That Mr. LeRoy had informed me that they had uncovered what [477] looked like a large scale kiting operation, not only covering the Produce Company account and Lofendo, but possibly others and other banks in the East.

Q. Now, was there any discussion at that time with Mr. Johnson with respect to the advice of credit?

A. Yes, I think there was.

Q. What was said in that connection, Mr. Duncan?

A. Well, that discussion was more between Mr. Johnson and Mr. LeRoy.

Q. You heard it, did you?

A. I heard it. I was there.

Q. What is your best recollection as to what was said in that connection?

A. That Mr. LeRoy wanted us to not act upon the advice of Credit, stating that it had been sent out in error and that the checks had not been paid.

(Testimony of Roland T. Duncan.)

Mr. Johnson wanted to cooperate with him, told him, I believe, that if we could safely not act upon the advice of credit, we would do so, to protect them, as long as we ourselves wouldn't suffer any loss on the account in Bakersfield.

Q. Did Johnson say that he wanted to call up Estribou and find out what the situation was with respect to the account before he acted on the suggestion respecting the advice of credit?

A. He did.

Q. And did he call up Estribou at that [478] time?

A. Yes, he did.

Q. Now, tell us what you heard of the conversation; that is Johnson's part of it. What did he say to Estribou as you recall it, Mr. Duncan?

A. Well, as I recall it, he told Estribou that both Mr. LeRoy and I were there at that particular time, that we had traced down a number of items that Mr. LeRoy was interested in, found their present disposition. We were asking him, or Johnson asked him, again as to the condition of the account, whether they had any good funds and whether they had any items out for collection whether any possibility of funds being made available through collection existed. I think that is about the substance, along those lines.

Q. And after Johnson got finished with the conversation, what did he report to you and LeRoy as to what had been said by Estribou?

A. As I recall it, he said that as of the moment,



(Testimony of Roland T. Duncan.)

Estribou said that everything was in the clear, it looked perfectly all right and that if the conditions layed that way—but Estribou had emphasized to Johnson, and Johnson told us first, that——

Mr. Lasky: Well, just a moment. I move to strike the statement that Estribou emphasized something.

Mr. Erskine: That can go out.

The Court: It may be stricken.

Mr. Erskine: What did he tell you? [479]

A. Johnson told us that he, Estribou, had told him that though the account looked in the clear at the moment, that there were so many items in transit that anything could happen.

Q. But he did report to you that Estribou had stated that at that time the account was in the clear?

A. It was in the black, yes.

Q. Was anything said in this conversation between LeRoy and Johnson that you can recall with respect to the right of the Bank of America not to enter the credit?

A. Yes, there was some discussion on that as to the right—if the credit got into, I believe, the hands of Lofendo, Lofendo should get access to the funds, I believe there was some discussion on that. But just the details, I wouldn't recall.

Q. Now after this conversation with Johnson, what happened then?

A. We went back, Mr. LeRoy and I went back to my desk and the letter was completed then.

(Testimony of Roland T. Duncan.)

Whether or not it had been started before or not, I don't know.

Q. The letter that you refer to is Plaintiff's Exhibit 10? (Handing to witness.)

A. Yes, that is it.

Q. That letter was completed then and signed by Mr. LeRoy? A. That is right.

Q. And it was delivered to you?

A. Correct. [480]

Q. What did you do with it at that time, do you recall, Mr. Duncan?

A. As I recall it, Mr. LeRoy and I again visited Ken Johnson's office.

Q. And did you submit the letter to Mr. Johnson? A. I believe we did, yes.

Q. Mr. LeRoy was there?

A. Mr. LeRoy, as I recall it, was with me, yes.

Q. And what did Mr. Johnson say?

A. I don't recall exactly what he said.

Q. Did he say, did he indicate that he approved of the form of the letter?

A. Indicated that it was o.k.

Q. That it was o.k.?

The Court: The letter dictated, signed by Mr. LeRoy? Exhibit 10, is it?

Mr. Erskine: Yes, your Honor, I am quite sure it is 10.

Mr. Lasky: I thought he was referring to the other.

Mr. Erskine: That isn't the Exhibit 10.

Q. And then did you prepare this letter or about

(Testimony of Roland T. Duncan.)

this time did you prepare the letter, Plaintiff's Exhibit 11, to Mr. Estribou, you recall?

A. I prepared it in the afternoon, yes.

Q. Did you submit that letter to Mr. Johnson too?

A. I could have. [481]

Q. What is your best recollection of that?

A. I just don't recall.

Q. Calling your attention, Mr. Duncan, to Plaintiff's Exhibit 11, you are quite sure that you dictated that in the afternoon after you finished talking with Johnson?

A. Yes, because I dictated, I would dictate it after I had received Mr. LeRoy's letter.

Q. Yes. This says at the end of it—withdraw that.

Did you have a talk that day with the Fresno Branch respecting the United Produce Company?

A. Yes, I believe I did.

Q. When did you have that talk with the Fresno Branch, what time of day?

A. As I recall it, in the afternoon of the 18th.

Q. The last sentence of that letter said, "For your information I have just finished talking to our Fresno office, and everything appears to be in the clear there." Does that line which I just finished quoting refresh your recollection as to the hour at which you talked to the Fresno Branch upon that subject?

A. Well, it can't have been much before I wrote the letter. I mean, it would be approximately at that time, just prior to that.

(Testimony of Roland T. Duncan.)

Q. Just prior to writing the letter?

A. Sure.

Q. That is your best recollection as to [482] when? A. Well, it must have been.

Q. Well, I am just asking you. What is your best recollection on that subject? Did you talk to the Fresno Branch shortly prior to the time you wrote the letter, or sometime prior to that?

A. No, it would be just before, just before.

Q. Did you at any time in the conversations with Estribou on that day tell Estribou that the advice of credit had been revoked, the telephone conversation? A. Did I tell Estribou?

Q. Yes. A. No.

Q. Do you recall whether or not Johnson, in talking with LeRoy told LeRoy that the Merchandise Bank was entirely in the right in revoking the advice of credit? A. I don't recall that.

Q. What is your best recollection as to whether or not something of that sort was said?

A. My recollection is that Johnson agreed to go along in doing what we could, again, to cooperate and help Merchandise National. He was asking Estribou to not act upon the advice of credit and asking for his cooperation.

Q. Did you ever tell Mr. LeRoy that Mr. Estribou had told you that the Bakersfield Branch had been alerted with respect to the Lofendo account by a communication the branch had received from the Merchandise National Bank? [483]

(Testimony of Roland T. Duncan.)

A. I did not.

Q. Did the Bank of America, Mr. Duncan, receive anything from the Merchandise Bank or from anybody else, in connection with this transaction between LeRoy and the Bank of America concerning which you have been testifying?

A. Not to my knowledge.

Q. Did it or did it not?

A. I would say no.

Q. At that time I believe you stated that you were Assistant Vice-President of the Bank of America, working in the Bank and Bankers division of the Bank?      A. Correct.

Q. Is that right?      A. Correct.

Q. And what was included in the functions of that department, Mr. Duncan?

Mr. Lasky: Now——

Mr. Erskine: Just one or two questions.

The Court: He has already agreed that he had authority to make any——

Mr. Erskine: Just one or two questions.

A. Banks and Bankers Department is a division of the administration department. Their duties were primarily servicing and soliciting correspondent bank accounts, servicing correspondent banks. It was the public contact, public relations end of it. [484] We would call on and solicit and work out arrangements for handling of prospective correspondent's business on the West Coast here and then pass that along to the operating department who would work out the details.

(Testimony of Roland T. Duncan.)

Q. It was a public relations job largely, was it?

A. When you are traveling on the road as much as we did, you are, public relations work.

Q. Now, is it a fair statement to say that in your conversations with Mr. LeRoy on November 18th, you, as a representative of that department of the Bank, were doing what you could to help out a customer?

A. That is correct.

Mr. Erskine: That is all.

Mr. Lasky: Just a couple of questions.

#### Redirect Examination

By Mr. Lasky:

Q. Mr. Duncan,——

The Court: I have some questions I would like to ask.

Mr. Lasky: Yes.

The Court: In the Bank of America, when one department of the Bank decides to do something, do they then have to ask the cooperation of another department? Is that the customary procedure? I mean, in the Bank of America, this is the Headquarters, and if they decide to do something, do they then ask the Branch Manager if he will do that? Is that the way it works?

A. Depending on what the matter is at that particular time, the [485] Branch Manager has pretty good authority in his own Branch.

Q. Is he independent?

A. To a large degree. He is following a standard practice, but to a large degree he operates on

(Testimony of Roland T. Duncan.)

his own authority, which is invested in him as a Branch Manager.

Q. Well yes, but now is he independent? I mean, if the Bank of America at the central office, or the President or the Vice-President or the Chairman of the Board, whoever is in charge of a particular department of a Bank,—if he tells the Branch Manager something, what does the Branch Manager do, say, “No, I don’t agree with you”?

A. Many times.

Q. And refused to do it?

A. If he thinks it is within his right, his power vested in him, the Branch Manager, yes, he will refuse to do it, and it comes to a head after that.

Q. It comes to a head after that?

A. I say, it might come to a head. It depends on the nature of the subject. He might win or he might lose.

Mr. Lasky: Might lose his job, too?

The Witness: Well, he could, but not very often. [486]

The Court: Well, that is what I wanted to get at. I understand the situation.

The Witness: It depends on the subject.

Mr. Lasky: I assume our stipulation about authority is still binding?

The Court: Oh, yes.

Mr. Lasky: We won’t have to go into this matter at all, then.

The Court: Oh, yes, I was just curious pri-



(Testimony of Roland T. Duncan.)

marily as to how these things operate in these bigger institutions.

Mr. Lasky: I would add to "curiosity," "incredulousness."

Q. (By Mr. Lasky): But now, Mr. Duncan, you have testified on examination by your counsel that you do remember having taken Mr. LeRoy's letter to Mr. Johnson, correct?

A. That is correct.

Q. And you remember distinctly that Mr. Johnson okayed Mr. LeRoy's letter, correct?

A. Yes, I would say that.

Q. But you say you don't remember having taken your own letter to your counsel to get his approval?

A. I said I didn't recall it, but no doubt I could have.

Q. Yes. And it is a fact, is it not, that you not only could have—you did; you asked him for his suggestions, he said he had none whatever and you sent out your letter?

A. That could possibly be. [486A]

Q. Well, it is, is it not, the fact?

A. You are asking me to say that I know definitely it is a fact, and I don't recall definitely that it was definitely the fact; but I will say that it very easily could have been, and possibly was, because I was counselling with him.

Q. Yes. Somehow, what happened to your own letter escapes your memory, but what happened to Mr. LeRoy's does not?

(Testimony of Roland T. Duncan.)

A. We went to Mr. Johnson for the purpose of accepting Mr. LeRoy's letter, not mine.

Q. All right. Now, of course, you have already said you sent out your letter, wrote it and sent it out to Mr. Estribou after all these conversations were over, after you finished talking to LeRoy and Johnson?

A. That would be the time that it would be sent, yes.

Q. Yes. Now, you have also testified that when Mr. Johnson, you and Mr. LeRoy, were talking, and on the telephone conversation from Mr. Johnson to Bakersfield there was a discussion about legal rights. Did you so testify?

A. I believe I used the term "legal rights." I might have.

Q. Well, I think your counsel did and you said yes. Now, it is a fact, is it not, that Mr. Johnson said to Mr. Estribou, and he also said in your presence and to Mr. LeRoy that if any credit was given to Lofendo and he was permitted to draw out funds on that \$113,000, the Bank of America would be acting at its peril?

A. Well, I don't recall that. [487]

Q. Isn't that the substance of what was said, if you don't recall the words?

A. I said there was conversation, but as to its acting at its peril, I certainly don't recall that.

Q. Well, you recall only to this extent, that there was discussion of what would be the legal rights if Lofendo got his hands on the funds, is that right?

(Testimony of Roland T. Duncan.)

A. There was discussion as to what would be the legal rights of wherever those funds went.

Q. Now, you have also said and there was discussion to the effect—let me withdraw that.

It is a fact, is it not, that Mr. Johnson had telephoned to Mr. Estribou, and in that conversation said that Estribou was to ignore the advice of credit when it arrived and when that advice of credit arrived through the mail, he should not make whatever entries he would usually make on an advice of credit?

A. As I recall, he asked us not to act upon the letter of credit, if he was all in the clear, which Estribou had indicated to him he was. But as Estribou also indicated to him, from what Mr. Johnson told us afterwards, the fact that though he was in the clear at the moment, with so many items in transit, he didn't know what the outcome was going to be.

Q. Well, Mr. Duncan, at that time you had already talked to Bakersfield the day before; you have testified to that?      A. Yes. [488]

Q. And you had been told that for some time they had been keeping an eye upon the Lofendo account, correct?      A. Correct.

Q. And that for some time they had been paying out only against collected funds, correct?

A. Correct.

Q. And you were told that again when you talked to Tarr on the 18th, correct?

A. It could be, yes.

(Testimony of Roland T. Duncan.)

Q. Well then, who raised the possibility that instructions at Bakersfield had been violated and that there was any possibility at all that there might an if involved about the East Bakersfield being in the clear?

A. As far as I am concerned, as far as I recall, it would be Frank Estribou.

Mr. Lasky: That is all. No further questions.

### Recross-Examination

By Mr. Erskine:

Q. You are a branch manager yourself, aren't you? A. I am.

Q. Managing the Berkeley branch?

A. Correct.

Q. And can any branch manager, in view of the number of items passing through an account, and the accounts of the bank and the number of transactions involved in a branch in one day, know the exact status of any account from the records of the branch? [489]

Mr. Lasky: Well, I won't object.

A. No, it would be impossible in practice.

Mr. Lasky: I am willing to stipulate that bankers can be taken frequently by swindlers, one way or another.

Mr. Erskine: Surely.

Mr. Lasky: No matter how careful they may be.

Mr. Erskine: Surely. And mistakes are made, with a great number of items passing through a bank in any day; and sometimes the checks are not

(Testimony of Roland T. Duncan.)

rejected in time, sometimes some of the technical rules are not complied with.

All right, that is all, Mr. Duncan.

The Court: Very well.

(Witness excused.)

The Court: Off the record.

(Off the record discussion.)

The Court: Very well, Court will stand in recess until twenty minutes after three.

(Recess.) [490]

Mr. Lasky: Mr. Tarr, will you take the witness stand, please?

#### IVAN N. TARR

was called as a witness on behalf of the plaintiff, sworn.

Mr. Lasky: I am calling Mr. Tarr under the privilege of the Federal Rules as an adverse witness.

#### Direct Examination

By Mr. Lasky:

Q. Mr. Tarr, you are assistant cashier and chief clerk at the East Bakersfield branch of the Bank of America, are you not? A. Yes.

Q. You have been such for approximately four years? A. Yes.

Q. You are what they call the operations officer of that branch? A. Yes.

Q. Do you recall having dictated this memo-

(Testimony of Ivan N. Tarr.)

random? I show you Plaintiff's Exhibit 12 in this case. Do you remember preparing that?

A. Yes.

Q. Do you remember preparing the later one, Plaintiff's Exhibit 13, dated November 15th?

A. Yes.

Q. Now, Mr. Tarr, as operations officer of that bank you used to open the mail that came into the branch, did you not? [491]

A. Occasionally.

Q. Including envelopes containing items for deposit in the Lofendo account?

A. Yes.

Q. You did open many such?

A. That is right.

Q. In this manner you learned originally of the facts which appear in the memorandum which you prepared, Plaintiff's Exhibit 12, the memorandum of October 22nd?

A. What was that question?

Q. You learned the facts which appear in this memorandum?

A. Yes.

Q. You learned of the unusual operations between United Produce Company and Frank Lofendo?

A. Yes.

Q. And you learned of the fact that there were so many large checks coming into the account from United Produce Company to Lofendo and so many large ones going out from the account to United Produce account? That is correct?

A. As a result—it came to my attention first of the large items being paid against his account and the large deposits being credited.

(Testimony of Ivan N. Tarr.)

Q. You referred in this memorandum to unusual operations, the facts that you thought were unusual were the activity in the account, the large items, and the fact that the checks were [492] payable to United Produce, and many deposits were checks of United Produce—those were what you thought were unusual?

A. Yes, that is unusual.

Q. At the time you prepared this memorandum of October 22, 1948, at the beginning of business of that day, October 22, 1948, your branch, the East Bakersfield branch, was entirely in the clear with respect to the Lofendo account, was it not?

A. Yes, I believe so.

Q. You had collected funds there and you had paid out nothing against uncollected funds?

A. I believe so.

Q. And then it was, with that condition of affairs, with the branch in the clear, Mr. Estribou instructed you that the branch was not thereafter to give credit to the Lofendo account on any items until they had been collected, until after Lofendo had been contacted; that is so, isn't it?

A. Well, it was not in the exact wording. It was to withhold credit on the items until such time as the items would have a reasonable length of time to clear.

Q. Following this memorandum of October 22, 1948, you did not then defer giving credit to the Lofendo account until items were actually collected, did you?

A. Until that time?



(Testimony of Ivan N. Tarr.)

Q. After that time.

A. After that time? [493]

Q. Yes. You did not entirely refrain from giving credit to the Lofendo account until checks were collected?

A. I believe we did.

Q. Beginning at a later time, shortly after the 22nd, isn't it a fact that from October 22nd, at the time you wrote this first memorandum until November 10th, instead of your branch refraining from giving credit on items until they were collected, you followed an entirely different practice of giving credit, but putting on the credit on the ledger sheet a hold to permit holding checks up from being drawn against it for a period of two or three days?

A. That is an ordinary practice.

Q. I did not ask you whether it was ordinary or not. I asked you whether that was what you did?

A. That is right.

Q. But on November 10, 1948, ten days after Mr. Rosenthal came into your branch with Lofendo, you decided to go upon a much stricter conduct of that account, isn't that right?

A. That is my instructions.

Q. I understand they were instructions, and you talked everything over with your manager, Mr. Estribou, before you proceeded with those instructions, didn't you?

A. That is right.

Q. My question is, beginning on November 10th, everybody in the branch after discussion at an

(Testimony of Ivan N. Tarr.)

officers' meeting decided to put [494] the Lofendo account on a much stricter basis?

Mr. Erskine: Just a second, if the Court please. That calls for the conclusion of the witness as to what is much stricter and what is less strict. I think it would be better to ask him what was done.

The Court: Well, yes. This is another one of those things, seems to me. It is like asking a witness whether or not a person is drunk. They say yes, and then they have to describe what leads them to believe that. It is one of those things. The facts will have to be developed.

Mr. Lasky: I will withdraw the question, because it is not worth taking time upon. I will put it another way.

Q. Beginning on November 10th, you decided, you, Mr. Estribou, and the other officers at your officers' meeting, that instead of passing immediate credit to the Lofendo account on any items that came in and then holding them with a tab or tag for a few days before permitting withdrawals, as you had been doing since October 22nd, from that time, November 10th, on you would not enter credit at all until and unless you actually got collection on the items; that is true, isn't it?

A. That is right.

Q. It was you who about October 22nd, telephoned to Mr. Dean Howell at Mazzie Farms asking the whereabouts of Mr. Lofendo, was it not?

A. Yes. [495]

(Testimony of Ivan N. Tarr.)

Q. You told Mr. Howell you were looking for Mr. Lofendo?

A. I asked Mr. Howell if he knew where he could reach Mr. Lofendo.

Q. Now, Mr. Tarr, returning your attention to the collection item of \$113,216.50, you remember when that item came into the bank on November 13th, you did send it out by a collection letter?

A. Yes.

Q. You never sent to Lofendo or addressed to Lofendo at any address whatsoever any copy of the collection letter or any copy of the advice of collection, did you?      A. No.

Q. You remember on the night of November 18th, you received a wire from the Continental Illinois National Bank of Chicago concerning the rejection of some checks for \$97,000. You remember that, do you not?      A. Late afternoon.

Q. It came in, the evidence has been stipulated to, about 4:45 and decoded about 5:15 or thereabouts. Now, do you remember that the next morning you telephoned to Mr. Duncan at the Banks and Bankers Division of the headquarters office in San Francisco?      A. Yes.

Q. And you told Mr. Duncan, did you not, that the advice of credit on the \$113,000 had not yet come in and you wanted [496] permission of the head office to use the advice of credit and take advantage of it when, as and if it arrived?

A. No.

Q. You do not remember that?

(Testimony of Ivan N. Tarr.)

A. I remember that. Did you ask me if I remembered it or if that was true?

Q. I will ask you both questions. Do you remember it and is it true?      A. It is not true.

Q. What was the telephone conversation?

A. I called Mr. Duncan and advised him that we had received this wire from Merchandise National Bank that they were rejecting the items totaling \$97,000, and in the conversation I stated that we were going to take credit on the \$113,000. I do not remember the exact amount.

Q. Have you finished your answer? I do not want to interrupt you.      A. That is all.

Q. You are quite sure when you spoke to Mr. Duncan, what happened was that you told him the advice of credit had come in and that you were going to take credit on it rather than you told him it had not yet come in and you wanted permission to do it, take credit on it when it did come in?

A. I did not ask him for permission because the instructions were given to me—— [497]

Mr. Lasky: I move to strike out "because." I merely asked him which was the fact.

The Court: It may be stricken. Answer the questions direction.

Q. (By Mr. Lasky): You remember Mr. Duncan told you to call your branch supervisor, Mr. R. D. Libbey about that?

A. He did not put it in that way, if I recall.

Q. How did he put it?

(Testimony of Ivan N. Tarr.)

Mr. Erskine: Wait a second. Let him finish his answer.

Mr. Lasky: Certainly.

A. He said it should go through the regular channels.

Q. To go through the regular channels, and you construed that to mean you were to get in touch with the assistant branch supervisor, Mr. Libbey?

A. Yes.

Q. The head office of the Bank of America has a system of supervisors over the branches, do they?

A. Yes.

Q. A supervisor has jurisdiction of a certain number of branches; is that the system?

A. That is right.

Q. And your East Bakersfield branch fell under the jurisdiction of assistant supervisor Mr. Libbey?

A. That is right.

Q. So then you did telephone your branch supervisor, did you? [498]

A. Yes.

Q. You thought he was at Fresno?

A. That is right.

Q. And you telephoned him at Fresno?

A. That is right.

Q. And you could not find him at Fresno?

A. The telephone operator said that he was not at Fresno, that she would try to reach him, that he was in San Francisco.

Q. So then you put the phone call through to San Francisco?

A. The operator did.

Q. And you talked to him there?

A. Yes.

(Testimony of Ivan N. Tarr.)

Q. And you told Mr. Libbey that the wire from Continental had come in the night before and you asked Mr. Libbey please could your branch take credit on the \$113,000? A. No.

Q. You did not? What happened?

A. I advised Mr. Libbey along the same lines I discussed with Mr. Duncan.

Q. What was that?

A. That we were going to take credit on the \$113,000 and also that we were advised that the \$97,000 worth of items were being returned.

Q. Do I understand you to say that you put in a telephone call to Fresno and then on through to San Francisco, and you [499] tracked Mr. Libbey all the way down to San Francisco just to tell him that you were going to take the credit rather than to ask his permission?

A. That is right. He should be advised.

Q. Is it your customary practice to get in touch with your supervisors to tell them what you are going to do?

A. Anything that might require—something unusual may be in the operations that might require a notification as to the branch supervisor, assistant branch supervisor.

Q. Now, Mr. Tarr, isn't it a fact that on the 18th day of November you had been in telephone conversation or communication with your San Francisco headquarters office?

A. The date, please?

Q. November 18th, the day before the telephone

(Testimony of Ivan N. Tarr.)

conversation with Mr. Libbey; I will re-word the question. It is a fact, is it not, that on November 18th, you had a telephone conversation with Mr. Duncan of the head office?

A. I do not recall that call.

Q. You do not recall it? A. No.

Q. You do not recall having talked to Duncan on the 18th?

A. There was one call that he called Mr. Estribou.

Q. But don't you remember that Mr. Estribou turned the call over to you?

A. Yes, I was up at his desk. Is that the call that you have [500] reference to?

Q. I merely asked you whether you did not have a telephone conversation with Mr. Duncan on the 18th? You did? A. Yes.

Q. You talked about this \$113,000 advice of credit which had not yet come into your branch?

A. No, he did not discuss that with me. If I recall, he had me look up some items on the account.

Q. You remember on November 17th, Mr. Estribou told you about a telephone call he had had from Mr. Messenger? A. Yes.

Q. And you remember on the 18th, Mr. Estribou told you about the telephone calls he had with Mr. Kenneth Johnson and Mr. Duncan at the head office about the \$113,000 advice of credit?

A. He mentioned the calls but I do not know what the conversation was.

Q. Had you finished? A. Yes.



(Testimony of Ivan N. Tarr.)

Q. Mr. Tarr, isn't it a fact that on November 18th you personally took the original deposit slip covering \$113,216.50 and marked it "Uncollected and unpaid" and that after you got Continental's wire late that night, either then or on the next day you destroyed the original tag? A. No.

Q. I want to show you two tags and ask you some questions [501] about them. I show you here a tag that has been marked Plaintiff's Exhibit No. 9, a carbon copy, which has already been in evidence and stipulated to be a carbon of the original deposit tag that came in on the \$113,000 item on the 10th. Will you examine that? A. Yes.

Q. Will you notice, please, that it has no marks of any kind on it?

A. Nothing but the time stamp.

Q. And the date on which it came in?

A. That is right.

Q. I show you here Plaintiff's Exhibit 15, which is a typewritten document, deposit tag, Frank C. Lofendo, for \$113,000, which the evidence shows was prepared on November 19th by your branch?

A. Yes.

Q. You prepared that, didn't you?

A. Yes.

Q. Personally?

A. Well, I do not know about that.

Q. Well, under your supervision?

A. Yes.

Q. How does it happen, Mr. Tarr, that in this particular case of the \$113,000, instead of using the

(Testimony of Ivan N. Tarr.)

deposit tag, a completely new deposit tag was typed up in the branch's office on November [502] 19th and ordered to put through the credit to the Lofendo account?

A. We have no use for that original deposit tag in any case when items are sent out for collection. We could not use that tag anyway, even though the collection was paid.

Q. Isn't this other tag, Plaintiff's Exhibit 15, the most unusual sort of thing to use to credit a collection item after it has been collected?

A. No, that is——

Q. You use this all the time?

A. That is right.

Q. And not the collection papers themselves?

A. That is right.

Q. You always prepare one of these, do you?

A. Yes.

Mr. Lasky: That is all.

### Cross-Examination

By Mr. Erskine:

Q. I think you said, Mr. Tarr, that the wire respecting the \$97,000 in checks was received from the Merchandise Bank?

A. I could be wrong there. I don't recall,—I mentioned that because that is where the checks were drawn.

Q. Do you recall whether or not it was received from the Continental Illinois Trust Company?

A. It could have been. [503]

(Testimony of Ivan N. Tarr.)

Q. You were also asked whether or not you telephoned to Howell. With respect to that, Mr. Tarr, did you believe at that time, in October, 1948, that Lofendo was connected, had some relationship with any firm down there in Bakersfield?

Mr. Lasky: I object to that as immaterial.

Mr. Erskine: Well, you asked if he telephoned to Howell. He did not telephone to Howell. I am trying to bring out the circumstances.

Mr. Lasky: Withdraw the objection.

The Court: Overruled.

The Witness: That was how I met Lofendo the first time was through Mr. Mazzi of Mazzi Farms.

Q. (By Mr. Erskine): And when you telephoned, as stated in your memorandum—I don't know whether you stated it there or not—at any rate, after this memorandum of October 22nd, you tried to get in touch with Mr. Lofendo?

A. Yes.

Q. Where did you telephone when you tried to get in touch with Mr. Lofendo?

A. I called the Bakersfield Inn, where he always stopped. I called there first and they stated that he was not there at the present time. He was not registered. So I then called Mazzi Farms and asked for Mr. Mazzi, and Mr. Howell answered the phone and stated that Mr. Mazzi was out. So I asked Mr. Howell about that at the time. [504]

Q. If he knew where Lofendo could be reached?

A. Yes.

Q. And what did he tell you?

(Testimony of Ivan N. Tarr.)

A. He stated that he was not in town at the present time, that he was in Chicago, and he was expected back in about two weeks, and occasionally Mr. Lofendo would call out to Mazzi Farms, and he said that if he should call within the next couple of days he would pass the information on. And I asked him if he would pass the information on to Mr. Lofendo, to have Lofendo contact Estribou as soon as possible. [505]

Q. And shortly after your memorandum of October the 22nd, Mr. Lofendo and another man turned up in the branch, is that right?

A. Yes.

Q. Now, Mr. Tarr, counsel has asked you about that portion of your memorandum of October the 22nd, the first paragraph of it, which says, "It has been brought to my attention of unusual operations between the two subject parties." That is, United Produce and Lofendo. Now did you have any conversation prior to the preparation of that memorandum of October the 22nd with respect to this Lofendo account, with Mr. Estribou?

A. I believe that was discussed at an officers' meeting.

Q. On what day, do you recall?

A. On the 20th.

Q. And was there any suggestion made at that time with respect to wiring the Merchandise National Bank concerning the account?

A. It was suggested, or rather I received an instruction from Mr. Estribou, to wire the bank

(Testimony of Ivan N. Tarr.)

asking them for the credit responsibility of the United Produce Company.

Q. And did you send out such a wire?

A. Yes.

Mr. Erskine: You haven't got the original of that wire, Mr. Lasky?

Mr. Lasky: Remember, you couldn't find the copy in your file and we couldn't find the original—although we both [506] knew there was some such wire.

Mr. Erskine: Yes.

Q. Now, did you get a response to your wire, Mr. Tarr?           A. Yes.

Q. I show you an exhibit that has been introduced in evidence in this case, marked Defendant's Exhibit O, and I will ask you if that is the wire that you got in response to your wire (handing to witness)?           A. Yes.

Q. Now this wire says, among other things:

“Suggest you contact your main branch at Fresno, California, who have complete information.”

That is the last words in the wire, and it is signed by Reichwine, vice-president. Did you contact the Fresno office of the Bank of America for additional information with respect to the United Produce Company?           A. Yes.

Q. With whom did you talk there, Mr. Tarr?

A. Talked to Mr. Nelson, the Fresno main office.

Q. Tell me, what did you say to Mr. Nelson?

A. I believe I read the wire that I had received

(Testimony of Ivan N. Tarr.)

and I told him that I was trying to secure further information in regard to the credit responsibility of United Produce Company and asked him what he could give me on it, and in his wire it referred us to the Fresno main office. And he—— [507]

Mr. Lasky: Just a moment. The question was what was said to Mr. Nelson.

Q. (By Mr. Erskine): Yes, then what happened after you said that to Mr. Nelson, Mr. Tarr?

Mr. Lasky: Just a moment, please. I would like to put in an objection. Number 1, we are not bound by what Mr. Nelson said, and Number 2, it is not cross-examination. I asked this witness nothing at all about that subject matter—didn't refer to it.

Mr. Erskine: Well, we will come back to the same old thing.

The Court: I don't know that it is technically proper cross-examination, but if it is going to speed anything up, I am in favor of listening to it at this point. The other objection, however, has merit. What is your position there?

Mr. Erskine: I think it is part of the circumstances, part of the *res gestae*. It is our contention, your Honor, that the Merchandise National Bank by this wire to us of October 20th, to the Bakersfield branch, said, "Suggest you contact your main branch at Fresno, California, who have complete information."

The witness has stated that he has contacted the Fresno branch. And I now propose to show that the Fresno branch had a letter from the Merchandise

(Testimony of Ivan N. Tarr.)

National Bank dated September the 22nd, 1948, and that the officer in the Fresno branch with whom the witness had this telephone conversation [508] read to him the letter, or a substantial part of the letter, and that that was the means by which the Merchandise National Bank chose to communicate additional information with respect to the United Produce Company to the Bakersfield branch.

Mr. Lasky: Well, of course, if a letter was written to Fresno and the wire refers to it, it brings the letter into it. But it doesn't bring into it anything that Mr. Nelson at the Fresno branch may have chosen to say about the letter, or any characterization——

The Court: His interpretation of the letter.

Mr. Lasky: Or the interpretation of the letter. The letter is one thing, Nelson's statements are quite another.

The Court: Are you going to produce the letter, is that it?

Mr. Erskine: I want to introduce the letter. I will introduce it right now, if your Honor pleases.

Mr. Lasky: If the letter ever came to the Bakersfield branch—that would be a necessary predicate.

Mr. Erskine: Oh, no; I think if the letter was communicated to the Bakersfield branch, that is all that I have to show.

The Court: Well, yes; I think that if the letter that Merchandise sent was communicated to the Bakersfield branch, that is sufficient.



(Testimony of Ivan N. Tarr.)

Mr. Lasky: If the letter was communicated, yes; but not Mr. Nelson's statement. [509]

The Court: No, not Mr. Nelson's statements interpreting the letter, what it means or anything of that nature.

Mr. Erskine: But if Mr. Nelson read that letter to the witness, that is a communication of it.

The Court: That is a communication, surely.

The Clerk: This is for identification right now.

The Court: It will have to speak for itself.

The Clerk: Defendant's Q for identification.

(Whereupon letter dated September 22, 1948, from Merchandise National Bank to Bank of America, referred to above, was marked Defendant's Exhibit Q for identification only.)

Mr. Erskine: That is letter of September 22, 1948. (To reporter): What was the last answer given by the witness?

(Record read.)

Q. (By Mr. Erskine): What did Mr. Nelson do when you told him about the wire?

A. He said he would go to the file and see what he had.

Q. And then was there a pause in the conversation? A. Yes, I waited some time.

Q. Then what happened?

A. He came back to the phone and he brought a letter back.

Q. And what did he do with respect to that letter?

(Testimony of Ivan N. Tarr.)

A. Well, he read the letter over the phone.

Q. Now I will show you this letter that is marked Defendant's Exhibit Q for identification and ask you if you will read that [510] letter and tell me if that is the letter that Mr. Nelson read to you over the telephone? (Handing to the witness.)

A. Yes, I can remember parts of it.

Mr. Erskine: I would like to offer the letter in evidence.

Mr. Lasky: The witness says it was read to him?

The Court: Yes.

Mr. Lasky: Yes, no objection.

The Court: Very well, it may be so admitted.

The Clerk: Defendant's Exhibit Q in evidence.

(Whereupon Defendant's Exhibit Q for identification only was received in evidence.)

Mr. Erskine: I would like to read the letter, if the Court please. It is a short one.

(Whereupon Defendant's Exhibit Q was read by Mr. Erskine.)

Mr. Lasky: You didn't read the whole thing.

Mr. Erskine: You mean this stamp here?

Mr. Lasky: Yes, it is part of the letter.

Mr. Erskine: "Confidential, for your private use." This is stamped at the top of the letter opposite the—"Confidential. For your private use and without responsibility on the part of the bank or its officers."

(Testimony of Ivan N. Tarr.)

Q. Now, I will show you your memorandum, which says this:

“Mr. Nelson of Fresno main office has been contacted and the information he gave us was no more than was contained in our wire response.” [511]

What did you mean by that, Mr. Tarr?

A. Well, I mean that——

Mr. Lasky: Well, I don't think we are bound by what was meant by it.

Mr. Erskine: Well, I would like to have him explain that statement in the memorandum that has been introduced.

The Court: Well, documents speak for themselves, don't they?

Mr. Erskine: Well, in my opinion they do.

The Court: It won't add anything to it.

Q. (By Mr. Erskine): Now after you had received that wire, you had talked with Nelson, did you have another talk with Estribou?

A. Yes.

Q. Tell us what was said in that conversation, Mr. Tarr.

A. I believe I brought him up to date on the wire received and the telephone call, the contents of the phone call.

Q. And what did Mr. Estribou say, what instructions, if any, did Mr. Estribou give you at that time?

A. He asked if—well, he asked that we place a

(Testimony of Ivan N. Tarr.)

hold on the account, or I will put it this way—that we do not extend immediate credit on the deposits until Mr. Lofendo had been contacted.

Q. Until you had contacted Lofendo?

A. Yes. [512]

Q. And it was at that time that you put in your call to the, first at the Bakersfield Inn, and then Mazzi Farm, in an effort to find Lofendo, is that right?

A. Yes.

Q. And did you thereafter see Lofendo in the branch?

A. Shortly thereafter he came in the branch with another fellow whom I didn't know.

Q. Did you talk with Lofendo at that time?

A. Yes.

Q. And what was your conversation with him at that time, Mr. Tarr?

A. I was busy at the time, and I asked him if he could step up to the front office, because it was Mr. Estribou that wanted to talk to him.

Q. And did he step up to the front office, do you know?

A. Yes.

Q. Who talked to him up there?

A. Mr. Cosgrove.

Q. Mr. Cosgrove is the assistant manager of the branch?

A. Yes.

Q. And did Cosgrove tell you what the conversation between him and Lofendo and this other man was after the conversation had taken place?

A. Yes.

(Testimony of Ivan N. Tarr.)

Q. Did you make a memorandum with respect to what Cosgrove [513] told you?

A. I believe it is contained in one of the memorandums.

Q. In the memorandum of November 15th?

A. I believe so.

Q. And can you tell us in substance what Cosgrove told you respecting what he had told Lofendo and this other man, without reference to that memorandum of November the 15th?

A. Well, he said he discussed the method of operations.

Q. That is, Cosgrove?

A. Cosgrove discussed the method of operations with Lofendo, and he seemed to be satisfied.

Q. Did he tell you he was satisfied?

A. Yes.

Q. What else did he tell you?

A. And I believe he asked Lofendo to build up a free balance in the account, to build the account up to the extent where the items, the deposits would clear before he would draw against the account. And he asked him,—that is, Cosgrove asked Lofendo—to send us a letter to that effect.

Q. That is what Cosgrove told you he had told Lofendo and this other man, is that right?

A. Yes.

Q. Now after that conversation had taken place between you and Cosgrove, what did you do with respect to the Lofendo account?

(Testimony of Ivan N. Tarr.)

A. We did not give him immediate credit on deposits, but [514] placed a hold on the account until such time that we would have a reasonable time to clear.

Q. Until the checks would have a reasonable time to clear? A. Yes.

Q. Then did you have another talk with Cosgrove with respect to—withdraw that.

You had an officers' meeting on November the 10th, didn't you? A. Yes.

Q. Did you have a conversation with Cosgrove prior to the date of that meeting?

A. Yes, a short one.

Q. With respect to this Lofendo account?

A. Yes.

Q. What was said in that conversation, Mr. Tarr?

A. Well, I either asked him or he told me that he had not received the letter from Lofendo as had been promised.

Q. And what else was said, if anything, about the subject? A. I don't recall.

Q. Did you then hold your officers' meeting?

A. Yes.

Q. Was the subject discussed then?

A. It was re-discussed at that time.

Q. What was said about it at that time?

A. Well, I was instructed, if I remember correctly, as to the memorandum, I was instructed to send the items out for collection. [515]

Q. Instead of using this hold method that you

(Testimony of Ivan N. Tarr.)

have described, you were instructed that you shouldn't give any credit until you actually got word, is that right? [515A]

A. That is right.

Q. Previous to that time, that is, after October the 22nd, and previous to the conversation of the officers' meeting on November the 10th, the checks deposited to the account had been sent forward with a so-called cash letter, is that right?

A. That is right.

Mr. Erskine: That is all.

Mr. Lasky: Just a question or two.

### Redirect Examination

By Mr. Lasky:

Q. Mr. Tarr, you talked to Mr. Nelson about the 20th of October, I think you said, was that right? A. I didn't say.

Q. Well, when was it?

A. It was around that time.

Q. All right. When you talked to him and he read the letter to you that has been given in evidence, Defendant's Exhibit Q, did he read the whole letter? A. Yes, I believe so.

Q. Did he read that stamp that says, "Confidential, for your private use and without responsibility on the part of this bank or its officers?"

A. No.

Q. He did not. When did you first see the letter yourself? A. Today.



(Testimony of Ivan N. Tarr.)

Q. Oh. The first time you have ever seen it, today? [516] A. That is right.

Q. So all that you knew about it up until a few minutes ago was your recollection of what Mr. Nelson had read over the telephone?

A. That is right.

Q. Well, after he spoke to you over the telephone, you then had your meeting with Mr. Estribou in which Mr. Estribou said thereafter you were not to allow Lofendo to draw immediately upon any funds in the account, when deposited, is that right?

A. That is right. He said that we were not to extend immediate credit.

Q. When you talked to Mr. Nelson on the 20th, didn't Mr. Nelson tell you that they themselves had an account in the name of Jack's Fruit Company or Jack Odo, in which they were getting checks of United Produce Company?

A. No, I don't recall that.

Q. Well, didn't you ask Mr. Nelson how the Fresno Branch had anything to do with United Produce Company?

A. No, I didn't discuss it.

Q. You were wholly incurious about it when you talked to him on the phone?

A. I was satisfied with the letter that he read.

Q. Didn't he tell you that his branch even then was refusing to honor checks of Lofendo against the deposits until they were cleared? [517]

(Testimony of Ivan N. Tarr.)

A. No.

Q. Didn't they tell you that? A. No.

Q. Didn't he tell you that even then, despite this letter they got from Merchandise Bank, they were rejecting checks of Lofendo's drawn against deposits which had not yet cleared?

A. No.

Q. Well, in any event, when you talked, after you talked to Mr. Nelson, you considered the situation with respect to United Produce Company's checks to be such that you weren't going to pay out against them until there was a period of time in which they could clear it, is that right?

A. Considered there was a good report.

Q. I didn't ask you that. I asked you whether you considered the situation was such that you decided you were not going to pay out against the Lofendo account on checks from United Produce Company until they had cleared? A. No.

Mr. Lasky (To reporter): Will you reread the question, please?

(Record read.)

Q. (By Mr. Lasky): You say you didn't consider the situation to be such? Do you understand me? A. I don't quite get your question.

Q. Well, Mr. Tarr, after your telephone conversation with [518] Mr. Nelson and after the wire you got from Merchandise Bank, you then had your discussion with Mr. Estribou, and the two of you concluded that, anyway, you were going to put in instructions that no checks were to be

(Testimony of Ivan N. Tarr.)

honored on the Lofendo account against deposits that had not yet cleared, is that right?

A. That is right.

Q. Very good. And ten days later, after Lofendo and Rosenthal came in, and a little later after that, when you failed to get a letter from Rosenthal, you decided that all their explanations were no good, and you went upon the more strict basis with respect to the Lofendo account, is that right?

Mr. Erskine: Well, I don't know about the form of the question. He asks for decisions on things of that sort. He can ask what was done.

The Court: Yes, I think that is so. It was after that time when the method of handling the items was by collection.

Mr. Lasky: Yes.

The Court: Collection only. That is the whole story of the thing.

Mr. Lasky: All right, I will withdraw the question. I think the facts are before the Court and the conclusions are there to be drawn freely.

The Court: Surely.

Mr. Lasky: No further questions, Mr. Tarr.

Mr. Erskine: Just one question, Mr. Tarr. [519]

### Recross-Examination

By Mr. Erskine:

Q. You said that you had seen the letter of September 22nd for the first time—I don't know whether you said a short while ago or what you

(Testimony of Ivan N. Tarr.)

did say. It is a fact is it not, that I showed you that letter in the office today, my office?

A. Yes, I said I saw it today.

Q. Yes.

Mr. Lasky: By the way, in view of the witness' testimony that the whole letter was not read, the stamp wasn't read, and that he didn't read the letter until today, I move to strike the letter from evidence, because we can't be bound by any partial contents of it that may be forwarded in any way to the East Bakersfield Branch.

The Court: Well, at least that portion of the letter that was read to him is admissible in evidence.

Mr. Lasky: Oh, I think the whole thing—this letter must to taken as a whole. When our bank sent it out, it sent it out with the protection of the stamp, that they assumed no responsibility for its contents. Now if that is forwarded to the Bakersfield Branch from the Fresno Branch without that, and there seems to be some claim that the East Bakersfield Branch in some way relied on this, although the evidence won't support it, I don't see how that can be attributed to us, because they are not acting upon precisely the document, and everything we [520] said, but only one partial bit of it they fixed up. [520A]

Mr. Lasky: Very well, your Honor.

The Court: But surely, if they didn't advise them of the stamp that appears on the letter, why

then, that goes as to how much reliance they were entitled to place or now claim, and bind you. That is just a matter for the Court to consider.

Mr. Lasky: Very well. I have no further questions of the witness.

Mr. Erskine: No further questions.

The Court: Very well. Does that end all of your matters?

Mr. Lasky: I have a short stipulation concerning Dean Howell's testimony which I might read. It is only a page and a half. May I read it?

The Court: Yes. You may step down.

(Witness excused.)

Mr. Erskine: Mr. Tarr is excused?

Mr. Lasky: Mr. Tarr is excused and we will not need him again, at least, I will not.

The Court: Very well.

Mr. Lasky: This is a stipulation that what I am about to read may be taken as the testimony of Dean Howell.

#### TESTIMONY OF DEAN HOWELL

"I reside in Bakersfield, California, and have done so for several years.

"I am Office Manager of Mazzie Farms at Arvin, California, near Bakersfield, and I held that [521] position in 1948.

"In 1948 I met one Frank C. Lofendo in connection with work and business done by Mazzie Farms.

"From April, 1948, to September, 1948, when Lo-

(Testimony of Dean Howell.)

fendo was in Bakersfield I posted mail for him as a favor.

“About September 15, 1948, I received through the mail from Lofendo a letter dated September 13, 1948, enclosing two sealed envelopes. These enclosed sealed envelopes bore the imprint of Bakersfield Inn, Bakersfield, California, as the return address. Each of the enclosed envelopes was addressed to Bank of America, East Bakersfield Branch, Bakersfield, California.

“The letter itself requested me to mail one envelope on September 15, 1948, and one on September 16, 1948. I mailed these envelopes on these dates as requested.

“Thereafter, from time to time until about the middle of November, 1948, I received through the mail envelopes addressed to me which bore the imprint of United Produce Co., Chicago, Illinois, as the return address with the initials “F. L.” typed above the printed name of United Produce Co. Each of these envelopes contained one or more sealed envelopes bearing the imprint of Bakersfield Inn, Bakersfield, California, as the return address and addressed to Bank of America, East Bakersfield Branch, Bakersfield, [522] California.

“Some of the outer envelopes addressed to me also contained a slip of paper with the notation when the inner envelope was to be mailed.

“I mailed all the enclosed envelopes.

“I did not open them.

(Testimony of Dean Howell.)

“One day in October, 1948, Mr. Tarr of the Bank of America, East Bakersfield Branch, telephoned me and told me that Mr. Estribou wanted to talk to Mr. Lofendo about Mr. Lofendo’s account and asked me where Lofendo was.

“Either the same day or the next day Lofendo telephoned to me stating he was in Chicago.

“I told Lofendo in that telephone conversation that Mr. Tarr had telephoned me, and I told Lofendo what Mr. Tarr had said. Mr. Lofendo stated that he was flying to Bakersfield from Chicago.

“On or about October 23, 1948, Lofendo called on me, together with a man whom he introduced as Mr. Rosenthal, an officer of United Produce Co.

“Later on that day or the next day I again saw Lofendo, and he told me that he and Rosenthal had just talked to an officer of the Bank of America, East Bakersfield Branch.

“Some time about the middle of November, 1948, I received a telegram from Rosenthal stating ‘Do not mail any more envelopes.’ This telegram was telephoned to me [523] by the telegraph company, and I do not have a written copy.

“I do not recall the date of receipt of this telegram, but I can fix it in relation to another event. Within a day or so thereafter Mr. Estribou of the East Bakersfield Branch of the Bank of America telephoned to me and said, ‘You had better come down here at once and explain your connection with Lofendo.’



(Testimony of Dean Howell.)

"I did call at the East Bakersfield Branch of the Bank of America and talked to Mr. Estribou, telling him that I had mailed envelopes addressed to the East Bakersfield Branch of the bank as a favor for Lofendo. Mr. Estribou then told me that the envelopes contained checks payable to Lofendo and deposit slips for deposit to Lofendo's account."

Mr. Lasky: That has been read into the record. I don't suppose it need be marked as an exhibit, but being a stipulation, we can file it in the cause.

The Court: Very well. [524]

Mr. Lasky: Now, if the Court please, the only other thing that I have besides the proposed stipulation hanging fire on the Chicago book and the reduction to narrative form of Gassman of Lofendo's testimony, is the question of whether Mr. Tobey and Mr. Erskine would produce a so-called privileged document for my inspection, and if not, I would like to put Mr. Tobey on the stand for a few questions to ascertain whether it can be called a privileged or not.

Mr. Erskine: As a matter of fact, your Honor, I am almost inclined to give him the thing but I have not had an opportunity to read it yet.

Mr. Lasky: Probably when I get it I will find nothing important.

Mr. Erskine: I do not think you will find anything in it you do not already know. I still think it is privileged but I would like to look at it. I will do it this evening.

The Court: Be prepared with reference to the matter in the morning.

Mr. Erskine: Yes. I do not stipulate I will let you see it. I think it is hearsay and I think it is privileged.

The Court: Be prepared one way or the other.

Mr. Lasky: Outside of those things that are still hanging fire, the Plaintiff's opening case in chief rests.

Mr. Erskine: It looks as though we are making good progress your Honor, and I do not think we will have to take much of your [525] time next week. I just want to examine Mr. LeRoy and Mr. Messenger, and then I will introduce part of the depositions, and then I will produce Mr. Tobey, and I will have perhaps two additional witnesses, but I think we ought to get through by Friday evening. I hope so. Subject, of course, to the fact that Mr. Lasky and I will wrangle about the stipulations during the week and take it up with you if we can't possibly agree.

Mr. Lasky: I hope your evidence does not require me to put in any rebuttal.

The Court: And you hope that Mr. Lasky does not waste a lot of time cross-examining your witnesses, is that it?

Mr. Erskine: I hope there is nothing insidious in that remark.

The Court: Very well, I think possibly if we do not meet until ten o'clock, we can get along well enough.

Mr. Erskine: I think so.

The Court: If necessary we have Monday of next week at our disposal, and we have Saturday of this week. So Court will stand in recess until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10 o'clock a.m. tomorrow morning, Thursday, June 22, 1950.) [526]

Thursday, June 22, 1950 at 10:00 A.M.

The Clerk: Merchandise National Bank vs. Bank of America on trial.

Mr. Lasky: I observed last night on reviewing the papers that the Defendant's retained office copy of the collection letter on the \$113,000 item has not been put in evidence, and with the consent of Mr. Erskine—he has consented—we have agreed that is ought to go in evidence. If Mr. Tobey will hand me that, I will put it in as Plaintiff's Exhibit 22.

(A document was handed to Mr. Lasky.)

Mr. Lasky: This is it. The document counsel hands me has two different ones.

Mr. Tobey: That is the way they come.

Mr. Lasky: The only one we are interested in is one that pertains to the \$113,000.

The Court: Very well, it is admitted.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 22.)

Mr. Lasky: I wonder if counsel has yet had an opportunity to clear the stipulations in which I

am interested on the depositions and the other, have you, Mr. Erskine?

Mr. Erskine: I have prepared a draft of a stipulation, your Honor, on that long stipulation that we discussed in the office. I will give you a copy of that, but I have not cleared [527] the others yet, but I assure Mr. Lasky I will have it cleared by tomorrow morning and I know there will be no doubt about it.

Mr. Lasky: With the reservation of my rights, my case is closed.

The Court: Yes. Very well.

Mr. Erskine: Before we start in, do you want to talk about this Tobey report? We can get that out of the way. I read that last night. My position about that, your Honor, is this: It might take a little time, but I would like to make this clear. I warn counsel and I say to the Court I am going to let him see the report. I do not care. But there is nothing in the report that is not in evidence. But I want to vindicate briefly as I can the position that I took with respect to the matter and I still think the position is sound. Mr. Tobey will testify, as I understand it, that after he got back to San Francisco from Bakersfield he saw Schilling. Schilling is counsel for the Bank, assistant counsel, I think, and also an officer of the bank, but in the legal department of the bank. Schilling told him to prepare a report dealing with what he had found out when he was down in Bakersfield because litigation threatened and he prepared a report, to Mr. Schilling with respect to what had taken place, that is

a very detailed report. It has attached to it the opinion of Mr. Bianco, who is counsel for the Bank, addressed to Mr. Schilling giving Bianco's idea of what he discovered, the law upon which he was relying, and etc., and so on. [528] Now, when Mr. Lasky asked for the production of it I said this:

"Now, with respect to that, that is the report which the witness states was made by him to Mr. Schilling and his counsel with respect to this matter. I regard it as privileged, and therefore as something he is not obliged to produce. We would be willing to produce it provided we are assured by you, Mr. Lasky, that the similar reports made by officers of Merchandise to its counsel, both yourself and Mr. Riordan in Chicago, will be produced for our examination. Now, I suggest we would be interested in seeing, of course, not only the report, if any, made by Mr. LeRoy to you personally, for similar reports made by officers of Merchandise, including Mr. LeRoy, to Mr. Riordan," whom I understand to be the counsel for the bank in Chicago—"who I understand is the counsel Merchandise in Chicago or any other counsel of the Chicago there or here in Chicago. Now, I do not know what your attitude would be with respect to that matter, but I would suggest this, that we do not want to place ourselves in a position in which Mr. Riordan refused to be bound by any agreement made by you. I do not suggest that he would refuse, but we want to be assured that if you made an agreement with me that such reports would be disclosed to us,

you make such agreement after consulting with Mr. Riordan so we can be sure that agreement will be carried out and have Mr. Riordan's full approval.

"In addition to that we would like to have it part of the [529] understanding that we will be given an opportunity to examine such reports at the same time that we disclose Mr. Tobey's report to Mr. Schilling to you. Now, that is our attitude with respect to this matter, and I think I have made it clear. You might state your position with respect to it, if you care to do so at this time."

Mr. Lasky said Mr. LeRoy had made oral report to him and he did not have a written report from Mr. LeRoy, that he did not know what Mr. Riordan's position would be.

Now, the law on the subject is stated in the case of *Hickman vs. Taylor*, a well-known case. I have no doubt the Court is familiar with the case, the case of this business of discovering in the Federal Court, giving very wide scope to the discovery but recognizing that the privilege of attorney and the client should not be undermined.

"We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation or necessarily free from discovery in all cases." This is after they said there should be a privilege. Let me go back a little bit.

"Were such materials open"—That is, materials obtained or prepared by counsel during a case or preparing for possible litigation—"Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would



remain unwritten. An attorney's heretofore inviolate would not be his [530] own. Inefficiency, unfairness and sharp practice would inevitably develop in the hearing of the legal advice and preparations of cases for trial. The effect on the legal possession would demoralized, and the cause of the client and the cause of justice would be poorly served. We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant, non-privileged banks remain hidden in an attorney's file, and where production of those facts is essential to the preparation one's case, discovery may properly be had," and so on.

It is true that Schilling is an officer of the bank as well as being the counsel of the bank, but his job is legal advice, legal help, and I think the fact that he is the internal counsel for the bank does not affect the matter of privilege. Otherwise corporations could not hire internal counsel. They would have to consult lawyers with outside counsel, and that does not make any difference. It is true that Mr. Tobey stated on the taking of his deposition prior to testifying he had read over the report, but if it is privileged that certainly does not destroy the privilege. If a lawyer has a written report from his client, and they are preparing to give a deposition or to go to trial, they certainly discuss the case with reference to the report, but that report cannot destroy the privilege, and I have not



been able to find any case holding that those [531] circumstances do destroy the privilege.

Now, it is also true that the later on Mr. Lasky asked Mr. Tobey questions about what he had done in Chicago, and Mr. Tobey was sent back to Chicago by Mr. Schilling to make an investigation and to report to Mr. Schilling, Mr. Tobey prepared another letter to Mr. Schilling stating what he had learned back in Chicago. Mr. Lasky's questions were not directed to the written report made by Tobey to Schilling of what he had done in Chicago, but to what the conversations between Tobey and the people he saw in Chicago were as reported back to Schilling, and I objected to that testimony. Now, we are willing to give them the report, your Honor, because there is nothing in that report that is not completely before this Court. It involves that letter of Bianco and other stuff, but it does not hurt us any. I will be frank to say that. Otherwise I would put up a fight on the proposition. We do not want to go into the Chicago business. We saw a lot of people back in Chicago and we had confidential discussions with them, and it might hurt them if it was disclosed.

Mr. Lasky: I am not interested in the Chicago phases of it.

Mr. Erskine: I will let him see the report.

Mr. Lasky: Before we come to that, however, let me say this: [532] On the taking of the depositions back in Chicago, Mr. Lasky refused Mr. Messenger and other witnesses—well, let me confine it to Messenger; that is as far as I got in my re-examination

of the depositions in this respect—he refused to permit Messenger to furnish certain reports and data for which I asked when the depositions were going on.

For example, on pages 377 to 378 of the Messenger deposition, I asked Mr. Messenger to furnish the form of financial report used by the bank in securing financial reports from the customers. I wanted it in connection with the investigation that they had made of United Produce, and to find out whether they were negligent or not. And Mr. Lasky refused, told Mr. Messenger not to produce it, and it was not produced.

On pages 378——

Mr. Lasky: Pardon me; we might as well clean up each of these as we go along if you think they are of importance. My memory is that we produced every paper we ever obtained from United. You asked for some paper which was not used with respect to United.

Mr. Erskine: It was a form of the bank statement which the bank requires of its customers before it makes them loans, a statement of their financial condition, and I wanted to find out whether such a statement had been procured from the United.

Mr. Lasky: You got the answer that it wasn't, and then you went on and wanted forms which were not used. We were on [533] about the 15th day in Chicago and we were getting tired.

Mr. Erskine: It wasn't the 15th day.

The Court: Gentlemen, if we are going to discuss matters of this nature, I think maybe we can handle them more quickly without cluttering up the record if we go into chambers and, we might settle some of these matters.

The Court will stand in recess.

(Recess.) [534]

Thursday, June 22, 1950, at 2:00 o'Clock

The Clerk: Merchandise National Bank vs. Bank of America National Trust and Savings Association.

Mr. Erskine: May I call Mr. LeRoy?

Mr. Lasky: Before you do that, may I suggest that, having examined the report of Mr. Tobey, there are two or three matters in there that I would like to get into evidence, and perhaps we can get it in by agreement.

Mr. Erskine: What are they? Of course, your Honor, he is entitled to see the report, perhaps, as part of the discovery, but the report is clearly hearsay.

Mr. Lasky: That is right; that is right, but it makes certain statements of fact.

The Court: Which reflects a situation which you may agree upon.

Mr. Lasky: That was it. Obviously, if we couldn't agree upon it, I would have to call Mr. Tobey and ask questions on it.

Mr. Erskine: What points have you in mind? I think we might possibly agree on it.

Mr. Lasky: There aren't many. Number one is

that Mr. Tobey himself on the morning of Saturday, November 20th, told Mr. LeRoy at Bakersfield that the Bank of America would have to charge Merchandise's account for the \$113,000. It was the future tense that I am referring to.

Mr. Erskine: Well, I am not going to stipulate to that. [535] You can put Mr. Tobey on the stand. The evidence shows already the charge was made on the morning of the 19th.

Mr. Lasky: The next thing is that on Saturday, the 20th, Estribou, Mr. Libby, the assistant vice supervisor, and Mr. Tobey, while at the East Bakersfield branch telephoned to Mr. Schilling, and it was in that telephone conversation of the morning of Saturday, November the 20th, that it was decided that the Bank of America would credit the \$113,000 to the credit of the Lofendo account.

Mr. Erskine: I am not going to agree to that. You can examine Tobey.

Mr. Lasky: The next is with respect to these items of \$75,000 which we talked about as laying around the branch and which we finally said were physically in the branch from Saturday, the 13th, until the following 18th. The situation was this: That these checks on Saturday, November 13th, were rejected by the bookkeepers at the branch because of insufficient funds in the Lofendo account, but through oversight the three checks were not returned but were held over until Monday, the 15th; that at that time when the checks for \$97,000 came into the Lofendo account and immediate credit was given against them, it was the intention to

charge the \$75,000 checks against that credit, but through oversight it was not done, and that, instead, further checks for a hundred odd thousand dollars came in and were charged against that credit, so that the \$75,000 checks [536] were not charged off until after credit for the \$89,000 collection letter had come through.

Mr. Erskine: I agree to that but I would like to put it in my own words, and consider the words in which it is put. We can put it in that stipulation that we were discussing the other day.

Mr. Lasky: You wish to draw up some language. I think we can wait.

Mr. Erskine: Mr. Tobey doesn't agree with that. However, I am perfectly willing to put into the stipulation that we were discussing the other day when this same subject what is in the report. That is the fact.

The Court: With reference to that last matter?

Mr. Erskine: Yes. I don't know as counsel's language is quite correct.

Mr. Lasky: I was summarizing it pretty hastily, obviously.

The Court: Very well then, you can work on that as part of the stipulation.

Mr. Erskine: Part of the other stipulation.

The Court: Very well.

Mr. Erskine: I think I should be permitted to go ahead with my case.

Mr. Lasky: This was one of the points kept open on my case.

The Court: Yes, I think so. I think counsel

should be permitted to examine with reference to the matters that he now [537] mentions.

Mr. Lasky: Then I ask Mr. Tobey to take the stand.

LLOYD J. TOBEY

recalled as a witness on behalf of the Plaintiff, previously sworn.

Direct Examination

By Mr. Lasky:

Q. Mr. Tobey, on the morning of Saturday, November the 20th, you had breakfast with Mr. LeRoy in East Bakersfield, did you not?

A. That is correct.

Q. And at that time you told him you were going to the East Bakersfield branch to get details about the Lofendo situation?

A. That is correct.

Q. And you told him that the Bank of America would have to charge Merchandise's account for the \$113,216.50?

A. My answer would be "yes," but I would like to explain it, your Honor.

The Court: All right.

Mr. Lasky: You are entitled to explain it.

The Witness: That's when I talked with Mr. LeRoy, I was in no position to give him and discuss any details, because I was charged with making an investigation, but I wanted to him to have an idea that his account was being charged, and our attorney told him very emphatically on Sunday just before he left that his account had been charged.

(Testimony of Lloyd J. Tobey.)

Mr. Lasky: I move to strike what the attorney told him on Sunday, that is after this conversation, and no explanation. [538]

The Court: It may be stricken.

Mr. Lasky: You didn't tell Mr. LeRoy at that time, that particular day, you had already put through a debit entry?

A. I did not.

Q. Now, sir, on November 20th, Saturday, you were at the branch with Mr. Libby and with Mr. Estribou, is that correct? A. Yes, sir.

Q. And you gentlemen had a telephone conversation that morning with Mr. Schilling?

A. That is correct.

Q. Mr. Schilling was in San Francisco?

A. Yes, sir.

Q. And in that telephone conversation it was agreed that the East Bakersfield branch should post or charge—credit, rather, the \$113,216.50 to the credit of the Lofendo account?

A. It is my recollection that my report says at that time we discussed the posting of the entry. The entry had been made, and we only discussed the posting of the entry.

The Court: It isn't a question of what your report shows; it is a question of what happened.

A. He asked me if we had a discussion, and he used three words "posting" and "charging" and "crediting," and my report says we discussed posting.



(Testimony of Lloyd J. Tobey.)

Mr. Erskine: Just tell Mr. Lasky what the conversation between you and Schilling was. [539]

The Court: At this point it isn't what your report shows that we are inquiring about. He is inquiring about what you did, not in your report, but what you said in your conversation.

Mr. Lasky: Yes. And my question was whether it is not a fact that in that conversation you agreed, it was agreed among you gentlemen, that you would post \$113,216.50 to the credit of Frank C. Lofendo.

Mr. Erskine: I think the question is improper; he is asking for the conversation, not what was agreed.

The Court: A conclusion as to the agreement. That is another one of those things that it is hard to separate the ultimate fact from the all of the facts that go to make it up.

Mr. Lasky: This is an adverse witness.

The Court: We all understand when the words "we agree" are used, we are not talking about a contract.

Mr. Lasky: What was said.

The Court: Those are words that we all understand the meaning of. But go ahead and develop the situation.

Mr. Lasky: Will you answer the question please?

A. Would you mind having it read?

Mr. Lasky: Certainly; would you read the last question?

The Witness: So that I know just what I am answering.

(Testimony of Lloyd J. Tobey.)

(The reporter read the last question.) [540]

Mr. Erskine: Same objection, your Honor.

The Court: Overruled.

A. It was agreed that we would post the entries to the account of Frank C. Lofendo.

Mr. Lasky: That is all.

Mr. Erskine: Let me see that report, please. Will you let me see Plaintiff's Exhibit No. 1?

#### Recross-Examination

By Mr. Erskine:

Q. Now, Mr. Tobey, I will call your attention to Plaintiff's Exhibit 2 in this case, which reads as follows: "General Ledger debit, accounting department, November 19th, 1948, \$113,216.50, total of collection letter of East Bakersfield Branch, No. 419, to Merchandise National Bank, Chicago, for which they have credit advice and are sending their debit. This debit requested by Mr. Estribou per telephone call to Mr. George Schilling, legal department."

Now, you prepared that debit memorandum, did you not? A. Yes, sir.

Q. That was prepared on the date it bears, November 19th? A. Yes, sir.

Q. Prior to your going down to Bakersfield?

A. Yes, sir.

Q. Mr. Schilling at that time told you that he talked with Mr. Estribou, and that Mr. Estribou

(Testimony of Lloyd J. Tobey.)

was going to enter the credit and wanted the debit entry to be made up in the central [541] office in order to charge the books of the Merchandise Bank?

A. That is correct.

Q. That is what you were told at that time?

A. That is correct.

Q. And therefore you made the debit entry, is that right?      A. That is correct.

Q. And this Plaintiff's Exhibit 2 reflects what you were told?      A. That is correct.

Q. And what you did?

A. That is correct.

Q. When you got down to Bakersfield and made the investigation, did you find out when this Defendant's Exhibit A, that is, the advice of credit relating to the six checks, was received at the bank?

A. I did.

Q. Did you find out that it was received as stamped or at 8:15 on the morning of November 19th at the Bakersfield Branch?      A. Yes, sir.

Q. And did you find out at that time when the actual entry of that credit to the account of Lofendo was made by the Branch?      A. Yes, sir.

Q. What did you find with respect to that?

A. That they had made a debit on the 19th, on Friday.

Q. Made credit? [542]

A. They made the debit and the credit.

Q. That is, they had sent the debit—by debit, you mean the debit which they had sent to the central office of the bank, so that the "Due To" ac-

(Testimony of Lloyd J. Tobey.)

count of the Bank of America to the Merchandise Bank could be debited with the entry, is that right? They made that debit entry?

A. They made the debit and they made the credit.

Q. That debit had already left the branch for San Francisco? A. Yes, I assumed it had.

Q. You do not know?

Mr. Lasky: I move to strike that out.

The Court: It may be stricken. The answer may be stricken.

Q. (By Mr. Erskine): But you do know that the credit entry was made by the branch on the morning of the 19th?

Mr. Lasky: I object to that as calling for hearsay on his part.

Mr. Erskine: Well, you were asking him about a lot of hearsay and his knowledge.

The Court: He has asked if he knows. He can testify about whether he knows or not. If then later it appears, of course, that it is hearsay, it may be stricken.

Mr. Lasky: From the nature of things, if the Court please, it would be hearsay, would it not? He was not there on the 19th. He did not get there until the 20th.

Q. (By Mr. Erskine): When you got there on the 20th you made an [543] investigation of the books of the branch, didn't you? A. Yes, sir.

Q. Did that credit entry for the six checks, \$113,000, then appear on the records of the branch?

(Testimony of Lloyd J. Tobey.)

A. No, because they had delayed posting and they had not posted the books yet. They posted the books in the morning, as we have talked about, as of the preceding day.

Q. They made the posting on the 20th as of the 19th? A. Yes, sir, that is the practice.

Q. Are you positive that that is so?

A. I am positive that they follow that custom, yes, sir.

Q. Are you sure that they did in this instance?

A. Yes, sir.

Q. Did you inquire into that? On what ground are you basing statement?

Mr. Lasky: Counsel is arguing with the witness.

The Court: He can cross-examine the witness.

The Witness: I did not go beyond this, that the item was in the work and we discussed it and were discussing the posting of it to the account, which would go through the same as all the other work of the 19th.

Q. (By Mr. Erskine): Are you talking from your knowledge of the General Banking practice of post-dating or are you talking from what you actually saw at the branch?

A. I was talking from what I saw at the branch, that they were [544] posting their work on the 20th, which is done in all of our branches. They were posting all the work of the 19th on the 20th and as of the 20th.

Q. This debit entry, Plaintiff's Exhibit 2, says this—this is dated the 19th—this debit requested by

(Testimony of Lloyd J. Tobey.)

Mr. Estribou per telephone call with Mr. George Schilling, legal department, Mr. Estribou requested that debit on the 19th, did he?

A. That is what I was told by Mr. Schilling.

Q. Do you know whether or not Estribou had actually credited the six checks, the \$113,000, to the account of Lofendo on the 19th or not? You know whether or not that was done on the 19th or 20th?

A. The actual posting of the credit was done on the morning of the 20th, along with other credits, with other entries on that day, of the 19th, to the books.

Q. In other words, it was put into the work on the 19th?

A. Put in the work of the 19th and posted on the 20th.

Q. In accordance with the practice of delayed posting?

A. That is correct.

Q. Were you there when it was done?

A. I was in the office when the work was done, but all the post work of the 19th was being posted.

Mr. Erskine: That is all.

The Court: Very well, you may step down. Does that complete your—— [545]

Mr. Lasky: The Plaintiff's case is over except for the two depositions——

The Court: The stipulations and the agreed statement of the depositions.

Mr. Lasky: That is correct, yes, your Honor.

Mr. Erskine: I want to clear something up;

(Testimony of Lloyd J. Tobey.)

something the witness has made clear to me. May I recall him for one question?

The Court: Yes.

Q. (By Mr. Erskine): Mr. Estribou stated when he testified that he had entered the credit for the six checks on the morning of the 19th. Now, in relation to that statement will you tell us what the procedure in the bank is with the respect to the entry of a credit?

Mr. Lasky: If the Court please, I do not understand the kind of question that starts off, "With relation to the testimony of another witness."

Mr. Erskine: I will withdraw the question and put it this way:

Q. How is a credit to the books of a customer in the bank of America initiated in a situation where a collection has been made such as in the case of the six checks?

A. We make up a debit to the account of the Bank that paid the money or credited the money, and they made up a credit to the customer, and then that is put through the work and into [546] the work, to be posted the next morning.

Q. In other words, the first step in entering the credit is making a credit memorandum. What do you call it?

A. Credit ticket or deposit ticket.

Q. A credit ticket or deposit ticket, is that right?

A. That is correct.

Q. And that is in the work on one day, is that right?

A. That is correct.



(Testimony of Lloyd J. Tobey.)

Q. And according to the process of delayed posting, if it is posted on the succeeding day, is that right? A. That is correct.

Q. Do you know when the deposit ticket or credit ticket in the case of these checks was put in to the work of Bakersfield Branch?

A. I was told that it was put in the work of the 19th.

The Court: Just a minute. The answer may be stricken. It was hearsay.

Mr. Erskine: I will show you here an Exhibit that was marked Plaintiff's Exhibit 15, which purports to be a deposit tag for \$113,216.50, which is dated November 19th, 1948. Is that the deposit tag or credit memorandum that goes into the work to which you just referred? A. Yes, sir.

Q. And that initiates the credit, does it? [547]

A. It does.

Q. It goes into the work, and then in accordance with the process of delayed posting, it is posted the next day? A. That is correct.

Mr. Lasky: If the witness is talking about practice generally that is one thing.

The Court: He was talking about the practice generally.

Mr. Lasky: All right, no objections then.

Mr. Erskine: That is all.

Mr. Lasky: Just one question.

(Testimony of Lloyd J. Tobey.)

Redirect Examination

By Mr. Lasky:

Q. On the morning of November 20th, before the actual posting of the books themselves occurred on this item of \$113,000,, you, Mr. Libby and Mr. Estribou did discuss it with Mr. Schilling by telephone in San Francisco? A. That is correct.

Q. And cleared the subject with them?

Mr. Erskine: Well, I do not know. I do not think you ought to call for these conclusions. I think he ought to ask for what was said.

The Court: Yes, I think that is asking the witness for a conclusion.

Mr. Lasky: I will withdraw the question.

Q. Who was it that conducted the phone conversation or were you all on the telephone at [548] once?

A. We were all on the phone. We talked to Mr. Schilling, I talked, too.

Q. Did you talk to Mr. Schilling yourself about the posting of the \$113,000, to the Lofendo account?

A. I do not know whether I talked to him or Mr. Estribou did, and which one of us talked to him about the account. We reported to him on the examination which had been made up to that time.

Q. You did discuss it with him——

A. We did discuss it.

Q. The posting of it?

A. The posting and clearing of it—the clearing of it and finally the posting of it.

(Testimony of Lloyd J. Tobey.)

Mr. Lasky: That is all.

### Further Recross-Examination

By Mr. Erskine:

Q. This is the actual language of your report on the subject?

Mr. Lasky: I object to the use of his language in the report.

The Court: Sustained.

Q. (By Mr. Erskine): Do you remember the conversation that you had with Mr. Schilling, without looking at the report to refresh your recollection with respect to that? A. No, I would not.

Q. What?

A. I wouldn't remember it at this time.

Q. Would you like to examine your report for the purpose of [549] refreshing your recollection with respect to what was actually said?

A. I would because I have not read that report before——

Mr. Lasky: Wait a moment. May I see it first to get the date on it, I am not so sure that this is the kind of report made in the course of business that a man could refer to for the purpose of refreshing his memory. It is dated December 10th.

Mr. Erskine: You were cross-examining him on the face of the report. I would like to get the actual language into the record.

The Court: No cross-examination was conducted on the basis of the report.

(Testimony of Lloyd J. Tobey.)

Mr. Lasky: It gave me a lead and some information.

The Court: He asked some questions but there were no questions as to whether or not he had made such a report.

Mr. Lasky: A report made in anticipation of litigation ought not to be referred to to refresh the recollection of a conversation that occurred that nearly three weeks before.

Mr. Erskine: I want to give a correct picture of what was said. Mr. Lasky has been referring to a report made on December 10th, 1948.

Q. You prepared such a report, did you?

A. I did.

Q. Do you recall the conversation between you and Mr. Schilling with respect to the posting of the six checks, the credit for [550] the six checks on the morning of the Saturday, November 20th?

A. Yes, I recall the conversation.

Q. Tell us what was said in the conversation, between you and Schilling, as well as anything else that was said with respect to the debiting of the \$97,000 against the account. Tell us what was said between you and Schilling on that point, so far as you remember.

A. As I remember it, I was telling him of the entry, of the \$97,000 that we had received in the telegram, and on the \$113,000——

Q. You discussed the entire situation?

A. The whole situation, that I developed up to that time and told him that we had this entry, and

(Testimony of Lloyd J. Tobey.)

they were going to post it and we wanted to post it, and discussed it, questions about it and said, "No," and we went ahead and posted it.

Q. That is, the entry based upon the deposit tag dated November 19th? A. Right.

Q. As well as the \$97,000?

A. In other words, we went ahead to complete the entries which had been made and started and originated on the 19th.

Mr. Lasky: I move to strike his answer, "To complete."

The Court: It may be stricken.

Mr. Erskine: When was the procedure initiated which was completed on the 20th? [551]

Mr. Lasky: That is calling for a conclusion. That would be hearsay on his part.

Mr. Erskine: I think it appears fairly enough anyway. That is all.

Mr. Lasky: I have no further questions.

The Court: Now is the Plaintiff's case closed with the exception of the stipulations that have been discussed and the resume of the depositions?

Mr. Lasky: That is correct, your Honor.

Mr. Erskine: Now I would like to call Mr. LeRoy.

The Court: Very well. [552]

ALLEN R. LeROY

previously sworn; recalled for defendant under Rule 43(b).

Mr. Lasky: This is Number 44 on the Messenger deposition.

Mr. Erskine: Mr. LeRoy, I am showing you an exhibit, or rather a paper dated October 1, 1948, and I will ask the clerk to mark it for identification.

The Clerk: Defendant's Exhibit R for identification.

(Thereupon the Tague Memorandum referred to above was marked Defendant's Exhibit R for identification.)

Direct Examination

By Mr. Erskine:

Q. I will ask you when you first saw that memorandum dated October 1, 1948?

A. It is my impression about October 2nd.

Q. About October 2nd?

A. Yes; it may have been on the first. However, I apparently did nothing about it until the second.

Q. That is the one marked Defendant Exhibit R for identification?

A. That is right.

Q. This memorandum begins with the statement: "It has been noted that checks in sizable amounts have been clearing through the company's regular account written on various California banks." The "company" referred to was the United Produce Company, was it?

A. Yes.

(Testimony of Allen R. LeRoy.)

Q. It continues: "We are paying against uncollected funds to present overdrafts." That was a correct statement of the [553] situation at that time, wasn't it?

Mr. Lasky: Just a moment, please. If the Court please, I have permitted preliminary questions to come in without objections and we have gotten directly to one of the counter-claims of the Defendant's answer. I certainly wish to make an objection for the record to the admissibility of all evidence on this subject.

The Court: Very well.

Mr. Lasky: Will your Honor permit me to state the objection briefly?

The Court: Yes.

Mr. Lasky: The point we make is simply this: The purport of the counterclaim is that there was some alleged negligence by the Plaintiff bank in the conduct of its business with the customer, United Produce Company, from which it is sought to be deduced that somehow or other this was a proximate cause of the loss which the Defendant Bank of America sustained when it paid out funds against uncollected checks on the item \$97,000.

We submit to the Court, number one, that bank has no duty with respect to another bank in a situation of this character.

Secondly, that there is not and can be no proximate causal relationship between any alleged negligence of the Plaintiff bank in its conduct towards its own customer, and any loss which the Defendant



(Testimony of Allen R. LeRoy.)

bank may have sustained here, just in the nature of the things, so far as the banks involved. [554]

Secondly, the evidence has clearly disclosed how the Defendant bank came to suffer its own pecuniary loss. It was due to its own negligence occurring after November 10th, when it itself felt that it was not safe in honoring checks drawn upon the Lofendo account until the funds had been collected, and any negligence which may have occurred in Chicago wouldn't reach through and have and causal relationship there.

I think the objection is well taken; I think this is just an open and shut proposition, and we are taking a great deal of time which is getting us nowhere.

The Court: The Court, of course, will reserve a ruling upon your objection and permit the Defendant to proceed with his testimony, and I will expect, of course, some memorandum with respect to the matter to aid me in making a decision on it.

Mr. Lasky: Just to avoid repeating these objections all along——

The Court: The objection goes to the whole matter.

Mr. Lasky: Perhaps to save it for the record, I ought to make a motion to strike, and do now make a motion to strike from Defendant's answer both counter-claims, and then it is understood I have a running objection to all evidence designed to sustain either claim.

(Testimony of Allen R. LeRoy.)

The Court: Yes, it may be so understood, and the Court reserves its ruling.

Now you have mentioned that it going to take a great deal [Balance of sentence missing in [555] copy.] What are the facts? Can't you stipulate to any of these facts?

Mr. Erskine: No, I think they will have to come out in the testimony, your Honor.

The Court: How are you going to prove it? With the officers of that bank?

Mr. Erskine: I am going to prove it by cross-examination of Mr. LeRoy and Mr. Messenger, and I am also going to prove it by the records of the bank.

The Court: All those matters can be stipulated to. I don't see why not.

Mr. Erskine: I don't think my cross-examination of Mr. LeRoy could possibly be stipulated.

The Court: Well, it won't go in in the same manner, Mr. Erskine, but whatever he testifies to, he would, I am sure, with a conference, admit for the purposes of stipulating to the facts.

Mr. Erskine: Well, I——

The Court: I realize that you may want to put it in in a particular way, but it isn't going to be impressive to the Court because it comes out in a particular way. If I get the facts upon which you wish to argue your point can be stipulated to, they should be.

Mr. Erskine: I really think, your Honor—I don't know how long——

(Testimony of Allen R. LeRoy.)

The Court: Are you going to have to introduce a lot of records of the bank in evidence, and argue all about these matters. [556]

Mr. Erskine: Not with this witness. I propose to get the records of the bank in by introducing the depositions. I have got the pages of the depositions—at least I have from one of them, and have the principle one, that of Mr. Messenger, that relates to the records. And I want to put the records of the bank in by introducing the exhibits as explained by those persons of the depositions. I don't even propose to read the depositions; I just want to refer to the pages, and Mr. Lasky can add any additional pages that he wants. But so far as this particular matter is concerned, your Honor, I can only get at it by the cross-examination of Mr. LeRoy and Mr. Messenger—that is, part of it—and I feel that it would be quite prejudicial to our side in this case if I were not permitted to go ahead with my cross-examination. [557]

The Court: Of course if you can't stipulate to the facts, then, of course, you would have to call the witness and cross-examine him; but I can see no reason why an effort to stipulate to the facts should not be made. These are all matters—as I say, this whole case has been brought up to the point of trial—rather, has been handled without taking advantage that the procedure that has been developed for the purpose of eliminating so much of this. Can't that be done, Mr. Erskine?

Mr. Erskine: Well, I don't know, unless they

(Testimony of Allen R. LeRoy.)

are willing to admit what they knew that a kiting operation was going on on October 1st, that they were so advised that a kiting operation was going on; that they made an investigation at that time and a special audit; that that audit gave as an excuse for the kiting operation an excuse which doesn't hold any water at all on the face of it; that the excuse was obviously unsound; that it should not have allayed their suspicion at all; it should have decreased their suspicions, but this witness was not satisfied with the——

The Court: Of course those are conclusions that you will have to argue.

Mr. Erskine: Those are the facts, your Honor, and I propose to prove those facts through this witness. I don't believe that they will stipulate to them.

Mr. Lasky: I certainly won't stipulate to the way you have stated it.

The Court: No, I don't think you will ever get a stipulation [558] like that, because they are conclusions on which you would argue as a result, but certainly if an audit was made, I think counsel would stipulate as to that and all the steps along. I don't see why you can't stipulate to those facts.

Mr. Erskine: If you will stipulate to what I have just stated; but I know he won't, and I am going to prove it.

The Court: All right, I am satisfied he won't stipulate to that either, Mr. Erskine; so go ahead.

Mr. Erskine: Yes, and I am going to show it.

Mr. Erskine: Now what is the last question?  
(Testimony of Allen R. LeRoy.)

The Court: It is understood, counsel, that all this testimony goes in under the reserved ruling of the court.

Mr. Lasky: Yes, so I won't be repeating the objection.

The Court: Yes, there is no necessity to keep repeating objections.

Q. (By Mr. Erskine): This statement here, Mr. LeRoy, says, "We are paying against uncollected funds to prevent overdrafts." That was a correct statement of the situation respecting the United Produce Company or their relationship between the United Produce Company and the Merchandise National Bank as of the date of this report, October 1, 1948? A. That is right.

Q. And it says, "One check has been returned uncollected in the amount of \$22,000." Did you ever see that check?

A. I assume I did; I can't recollect it at the present time, [559] from memory, however.

Mr. Erskine: I will ask that this be marked.

The Clerk: Defendant's Exhibit S, for identification.

(The check referred to was marked Defendant's Exhibit S for identification.)

Q. (By Mr. Erskine): Showing you Defendant's Exhibit S for identification, I will ask you if that is the check referred to in Mr. Tague's memorandum which I have just read to you?

A. Well, frankly, I don't know if it appears to

(Testimony of Allen R. LeRoy.)

be that it is; there was a check returned at that time which brought it to our attention.

Q. You don't recognize this as the check?

A. No, sir, I don't as the definite check.

Q. Now I want to call your attention, Mr. LeRoy, to page 182 of your deposition.

Mr. Erskine: It will be stipulated, will it not, counsel, that this check that I now hold in my hand was marked Defendant's Exhibit 6 for identification upon the taking of the deposition of Mr. LeRoy.

Mr. Lasky: Well, if you tell me it is.

Mr. Erskine: It is.

Mr. Lasky: All right; O.K.

Q. (By Mr. Erskine): I will call your attention, Mr. Witness, to the fact that this check was marked Defendant's Exhibit No. 6 for identification upon the taking of your deposition. [560]

A. Yes, sir.

Q. On page 182 of your deposition you stated this:

"Mr. Erskine: Now I will ask the reporter to mark this draft please as Defendant's Exhibit No. 6 for identification."

And skipping:

"Q. Mr. LeRoy, I show you Defendant's Exhibit No. 6 for identification, and I will ask you if that check or that item was ever called to your attention?

"A. My impression is that it was, yes.

"Mr. Lasky: Well, that is all.

(Testimony of Allen R. LeRoy.)

“The Witness: All right.

“Mr. Lasky: You have answered the question.

“The Witness: All right.

“Q. (By Mr. Erskine): When?

“A. Sir?

“Q. What is your best recollection as to when it was called to your attention?

“A. Either the last days of September or the first of October.”

You gave that testimony, Mr. LeRoy?

A. As I remember it, yes, sir. As you read it from the deposition, I will assume the responsibility for it.

Q. So that this check that has been marked on this trial as Defendant's Exhibit S for identification was called to your attention during the latter part of September or the first part [561] of October, 1948, is that right?      A. Yes, sir.

Q. Who called that check to your attention?

A. Frankly, I don't remember who called it to my attention; it was called as a result of its being returned—either the return teller or one of the assistant operating officers. I don't recall who returned it.

Q. Before I come to that, Mr. LeRoy, I will ask you if it is not a fact that this check, Defendant's Exhibit S for identification, is the check referred to Tague's memorandum of October 1st, in which he says, “One check has been returned un-



(Testimony of Allen R. LeRoy.)

collected in the amount of \$22,000''? That is correct, isn't it?

A. Well, I assume that it is. I think it has been stipulated that they are one and the same items. Yes, it is. He says approximately 22.

Q. You say either the return teller, called that check to your attention or an operation officer of the bank? A. Somebody in the books.

Q. It wasn't Mr. Collins?

A. It might have been, I don't remember.

Q. Will you say that it wasn't Mr. Collins?

A. Well, I wouldn't say it wasn't. I do not recollect who called it to my attention.

Q. Do you remember, as a matter of fact, Mr. LeRoy, that that check was called to your attention by Mr. Collins and that you [562] and he had a discussion with respect to the check and with respect to the account?

A. I do not recollect that at all.

Q. Will you deny that it occurred?

A. I will not deny it, but I do not remember it.

Q. Who was Mr. Collins at that time?

A. Cashier at the bank.

Q. He was the cashier of the Merchandise National Bank at the end of September and in October or in September and October of 1948, is that right? A. Yes, sir.

Q. Is he any longer with the bank?

A. He is not.

Q. Do you know what his present position is?

A. Yes, sir.

(Testimony of Allen R. LeRoy.)

Mr. Lasky: If the Court please, this is hearsay, what he knows. I think it is irrelevant.

The Court: What difference does it make? [563]

Q. (By Mr. Erskine): I will ask you this, Mr. LeRoy: Isn't it a fact that you and Mr. Collins had a conversation about that check and the account, and that in that conversation Mr. Collins told you that the check had been called to his notice upon its return; that he had thereupon examined the account and that he believed that a kiting operation was going on in the account?

A. I do not recall such conversation with Mr. Collins.

Q. Will you deny that such a conversation occurred?

A. I do not recall it. I will not deny it; it is possible.

Q. Well, now, Mr. LeRoy, that does not occur every day in the banking business, does it?

A. No, sir.

Q. It is not a usual, routine affair, is it?

A. No, sir.

Q. The cashier of your bank is a fairly important official in the bank, is he not?

A. Yes, sir.

Q. And if Mr. Collins had called to your attention this check and had told you that he had examined the account of the Merchandise National Bank and its transaction and that he believed that a kiting operation was going on, do you think that

(Testimony of Allen R. LeRoy.)

you would remember it or that it would escape your memory?

A. I don't think—I think I would remember it had it been stated definitely there was a kiting operation; but I don't [564] think anybody could state definitely there was a kiting operation at that time. And investigation was made.

Q. I am not asking you whether or not Mr. Collins stated definitely whether a kiting operation was going on; I am asking you whether or not he told you that he suspected that a kiting operation was going on?

A. I don't remember talking to Mr. Collins in reference to this transaction at all.

Q. But you will not say that no such conversation took place?      A. No, I couldn't.

Q. I will ask you whether or not it is not a fact that you and Mr. Collins went to see Mr. Redheffer and discussed this transaction, the United Produce Company account, with him? Do you remember any such conversation?

A. I remember a conversation with Mr. Redheffer, but not Mr. Collins' participation in it.

Q. Mr. Redheffer was the president of your bank at that time?      A. Yes, sir.

Q. Mr. Redheffer is now chairman of your board, isn't that right?      A. No, sir.

Q. What is that?      A. No, sir.

Q. When he cease to be chairman of your board?  
Mr. Lasky: I object to that as immaterial. [565]

(Testimony of Allen R. LeRoy.)

Mr. Erskine: It has a particular purpose, your Honor.

The Court: As to whether he is now president of the board?

Mr. Erskine: Whether he is now chairman of the board.

The Court: It doesn't make any difference whether he is or not.

Q. (By Mr. Erskine): I will ask whether or not it is not a fact, Mr. LeRoy, that in the conversation between you and Mr. Collins and Mr. Redheffer—or, rather, I will ask you whether or not it is not a fact that you, Collins and Redheffer had a conversation towards the latter part of September of 1948 in which Mr. Collins told Mr. Redheffer in your presence that he strongly suspected—or let us say, that he suspected that a kiting operation was going on in the account of the United Produce Company.

A. I do not remember that conversation that you are calling to my attention. I had a talk with Mr. Redheffer. I do not remember Mr. Collins participating in it, and I do not remember strong, definite statements about a kite being suspected, because bankers as a rule are a little careful about making accusations of that kind.

Q. If you don't remember, strong, positive statements, do you remember any statements by Mr. Collins to the effect that there might be a kite in the United Produce Company account?

(Testimony of Allen R. LeRoy.)

A. I do not remember Mr. Collins—— [566]

Q. Wait a minute; let me finish my question. Do you remember such a statement?

A. I don't remember Mr. Collins making any statement about it.

Q. Will you say that Mr. Collins did not make such a statement to Mr. Redheffer in your presence?

Mr. Lasky: If the Court please, the question has been asked and answered several times.

Mr. Erskine: No, it has not.

Mr. Lasky: The witness says he doesn't remember.

The Court: He says he doesn't recall any conversation between Collins, Redheffer and himself.

Mr. Erskine: I want to find out if he will deny positively that such a conversation took place.

The Court: That is just one of those things, isn't it, Mr. Erskine, if you can't remember anything about it—he doesn't recall any conversation at all. You want him to say that no such conversation took place. He said he couldn't do that, didn't he?

Mr. Erskine: He said that he couldn't deny that such a conversation took place between him and Collins, but he has not yet made the same statement about a conversation between Collins, Redheffer and himself.

The Court: All right; go ahead.

A. I can't deny—— [567]

(Testimony of Allen R. LeRoy.)

Q. (By Mr. Erskine): You——

The Witness: Pardon me.

Q. (By Mr. Erskine): You won't deny that Mr. Collins in your hearing told Redheffer that he suspected that a kiting operation was going on in the account towards the end of September, '48? You won't deny that, as I understand you?

A. I won't deny it, but I don't recall it.

Q. Yes.

A. It might have, but it is peculiar I wouldn't recall it.

Q. I admit it is peculiar. Now, Mr. LeRoy, you do recall, however, that you and Mr. Redheffer did have a discussion with respect to this account towards the end of September of 1948, is that right?

A. I would say that it was about October 2nd, from that memorandum; perhaps prior thereto.

Q. Isn't it a fact, Mr. LeRoy, that you had your discussion with Mr. Redheffer before Tague made his investigation?

A. I may have.

Q. What is your best recollection with respect to that?

A. I assume probably we did talk it over.

Q. You assume, and it is your best recollection, let us say, that prior to October 1st, the date of Tague's report, you and Mr. Redheffer had talked with respect to the United Produce Account? That is your testimony, is it?

A. I would assume that that was correct, [568] yes.

(Testimony of Allen R. LeRoy.)

Q. What did you and Mr. Redheffer say with respect to United at that time?

A. As to the United Produce account and the fact that they were drawing against uncollected funds, and the reason for those checks appearing in their regular deposit account. [568-A]

Q. You discussed the fact that checks were being deposited, checks drawn by Lofendo to the order of United Produce Company were being deposited to the credit of the United Produce Company, and that at the same time the United Produce Company was drawing checks to the order of Lofendo which were being debited against the account? You discussed that fact?

A. That fact, yes. and the other checks which were being handled in the manner.

Q. You discussed that fact, the checks on both sides to which I have just referred, also the fact that the United Produce Company was drawing heavily against uncollected funds, did you?

A. Yes, sir.

Q. You and Mr. Redheffer in that conversation agreed with one another that the special investigation of the books of United Produce Company should be made for the purpose of determining what the situation was, is that right?

A. That is right.

Q. With respect to those two matters: First, the checks on both sides and the drawing on uncollected funds?

A. That is right.

Q. And then you, pursuant to those instructions



(Testimony of Allen R. LeRoy.)

told Mr. Tague, the auditor of the bank, the outside auditor of the bank, to go down to the books of the United Produce Company and make a special examination of them for the purpose of investigating those two facts? [569]

A. He was told to do it.

Q. He was told to make that investigation?

A. Yes, sir.

Q. Then, Mr. LeRoy, Mr. Tague made this report dated October 1st, 1948, and presented it to Mr. Rudolph as a result of his investigation?

A. That is correct.

Mr. Erskine: I would like to introduce this in evidence, if the Court please.

Mr. Lasky: I suppose my running objection goes to the document.

The Court: Yes, and they will also be admitted under a reserved ruling of the Court with reference to all of them.

Mr. Erskine: I would like to make this observation, if the Court please, while that counsel examined the witness of the Bank of America at some length, and for the purpose of showing negligence and their suspicion with respect to a kite, or what he hoped to be was a suspicion with respect to a kite, but he objects to my doing the same with his witness.

Mr. Lasky: The relevance is quite different.

The Court: We need not argue the matter now because the Court is not prepared to rule on the matter.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: I will ask you, Mr. LeRoy, if you regarded Mr. Tague's memorandum of October 1st, which has been marked Defendant's Exhibit R, as a satisfactory explanation of the [570] checks on both sides and the drawing of uncollected funds by the United Produce Company, did you?

A. Personally I was not completely satisfied.

Q. Well, it is a fact, though, that you have already told Duncan, you have already testified that when you saw Duncan on the morning of November 18th, you told Duncan that early in October the Merchandise had noticed a volume of items going through the account, which had made them suspicious, and that it had checked up to the best of its ability on the United Produce books and at that time had obtained what appeared to be a satisfactory answer to their questions. You have already testified to that.

A. Yes, I told them that.

Q. You told Mr. Duncan that, is that right?

A. Yes, sir.

Q. But you now say that you did not find Tague's report of October 1st entirely satisfactory to you personally, is that right?

A. That is correct.

Q. Was it satisfactory to Mr. Redheffer?

A. Yes, sir.

Q. But it was not satisfactory to you, is that right?

A. Not completely.

Q. I ask you, Mr. LeRoy. if you did not testify

(Testimony of Allen R. LeRoy.)

as follows when your deposition was given, page 230: [571]

“Now, I believe that you referred to this memorandum, Defendant’s Exhibit 44 of Tague’s which should have been Messenger’s—it is the same thing as this October 1st report—and said that you regarded that memorandum as a satisfactory response to the inquiry that you had made, to which the memorandum was a response, is that correct?

“Yes, a satisfactory explanation.

“Q. Satisfactory explanation?

“A. Yes.

“Q. It was a satisfactory explanation to you, was it, to the bank? A. Yes.

“Q. Was it to you?

“A. We accepted it.

“Q. I am asking you, Mr. LeRoy?

“A. Naturally it was satisfactory to me if he accepted it.

“Q. I am asking you whether or not the memorandum is a satisfactory explanation to you as a banker? A. Yes.

“Q. And did you tell Mr. Tague and the other officers? A. I don’t know.”

Did you give that testimony?

A. As I remember, yes, sir. [572]

Q. You testified a few minutes ago that it was not satisfactory to you personally. Now, what is right? What you testified to when your deposition was taken or what you have just stated?

(Testimony of Allen R. LeRoy.)

A. I would say they were in conformity, the two things. It was satisfactory to the bank and it became satisfactory to me because the majority of the people handling it were satisfied. and I accepted it.

Q. But you were really not satisfied?

A. I did not say that I was not satisfied. I was not completely satisfied with it, and I think the deposition concurs in that.

Q. What the deposition says will speak for itself.

The Court: You were asking him which one was true and he is answering it for you. In other words I do not think you should have asked the question. That is a matter for the Court to determine.

Mr. Lasky: Personally I think the witness is correct when he says the two are in conformity.

The Court: That may well be. Sometimes when you ask questions that should not be asked, you get answers you do not want to get.

Mr. Erskine: Yes, that is true but let me read the testimony again.

Mr. Lasky: This time, counsel, distinguish the questions from the answers.

The Court: Is this the same testimony? [573]

Mr. Erskine: Yes.

The Court: Don't read it again. I have heard it. So has the witness. Why go over it again now? It is in the record. [573-A]

(Testimony of Allen R. LeRoy.)

Mr. Erskine: He says unequivocally the memorandum was satisfactory.

The Court: It is in the record that way. Don't do it again and again. I have some intelligence.

Mr. Erskine: I am just——

The Court: I know, counsel, but why go over it again? It was read once, the answer is there, "yes," and then he makes his explanation. That is there. There is no use going over it again.

Q. (By Mr. Erskine): Well, now, Mr. LeRoy, coming back to this matter of this memorandum, it says here that it has been noted that checks in sizable amounts are clearing through the company's regular accounts drawn on various California banks. You knew that those checks were checks of Lofendo's drawn on the Bakersfield branch? You knew that at the time that this report came to your notice about October 1st, didn't you?

A. Some of them were not.

Q. Most of them were; that is correct, isn't it?

A. As I remember it, the most of them, but there were other checks, too.

Q. Now, the memoradnum goes on to say, "The Company's records reveal that this activity stems from three accounts which are carried on the books as pre-season advances." Now, those three accounts were referred to in the memorandum as the [574] Lofendo, Mazzi Farms and Jack's Fruit Company. That is a fact, isn't it?

Mr. Lasky: The memorandum speaks for itself, counsel.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: It is just preliminary.

The Witness: I would be guessing.

Q. (By Mr. Erskine): And then this memorandum says, "However, these accounts—that is, the three accounts, the Mazzi Farms, Jack's Fruit and Lofendo—now record brokerage transactions engaged in by United Produce with the grower acting as their agent." You understood that to mean that the grower referred to in that sentence, which is the second sentence of the second paragraph, were the three people just mentioned, Mazzi Farms, Lofendo, and Jack's Fruit Company?

A. I assume that is correct, yes, sir.

Q. That is correct, isn't it?

A. I will say it was.

Q. Now, the memorandum goes on to say this:

"Mr. Gassman explained that lots of grapes are produced by the grower for cash."

Again the word "grower" refers, as you understood the term, to Mazzi Farms, Jack's Fruit Company or Lofendo; that is correct, is it?

A. Yes, sir.

Q. It says, to go back, "Mr. Gassman explained that lots of grapes are produced by the grower for cash. United Produce [575] is immediately advised of the purchase and forwards the cash. The car or cars are then shipped to the customer of the agent, and upon collection of the amount due, the agent or grower sends his check to United Produce." That was the explanation given by Tague

(Testimony of Allen R. LeRoy.)

in his memorandum to answer the fact that the checks appeared on both sides; that is correct, is it not?      A. Yes, sir.

Q. Now, you understand that when I say the checks on both sides, I mean checks being deposited to the credit of United Produce Company drawn by Lofendo and checks drawn by the United Produce Company to the order of Lofendo and charged against the United Produce account; you understand that?      A. Yes, sir.

Q. Now, I will ask you whether or not you understood that explanation that I have just given to you or just read to you to mean this, that the United Produce Company would purchase a car of produce for Lofendo and that it would reimburse, it would send Lofendo a check for the purchase, and that Lofendo would then ship the car and collect the sales price of the car and reimburse the United Produce Company with his check? That is what this says, does it not?

Mr. Lasky: Won't it speak for itself?

The Witness: I think it says that. I think it says that he sold it for cash. but that is immaterial. He was reimbursed.

Q. (By Mr. Erskine): "United Produce is immediately advised [576] of the purchase and forwards the cash." You meant forwards the checks, did you not?

Mr. Lasky: The witness did not write the memorandum.



(Testimony of Allen R. LeRoy.)

The Court: That is not the witness' memorandum.

Mr. Erskine: I want to find out what he understood the memorandum to mean, your Honor.

Q. You did not understand it to mean that the United Produce sent Lofendo currency for the price of the car, did you?

A. No, I knew they did not.

Q. You understood it to mean that the United Produce Company sent Lofendo a check?

A. Yes.

Q. And then Lofendo shipped and sold the car, collected the proceeds and sent his check to United Produce Company? That is what you understood it to mean? A. Yes, sir.

Q. Now, at the time this memorandum of October 1st, 1948, was made, you were the loaning officer of the Merchandise Bank in charge of the United Produce Account, were you not?

A. Yes, sir, at that time.

Q. You were there temporarily during Mr. Reichwine's absence, is that right?

A. That is right.

Q. Mr. Reichwine was ordinarily in charge of the account, was he? [577] A. Yes, sir.

Q. Mr. Reichwine had gone away on his vacation about September 20th, is that right?

A. Yes, about then, about the 18th or 20th.

Q. And continued away until about October 18th, is that right? A. That is correct.

(Testimony of Allen R. LeRoy.)

Q. And you were in direct charge of the account during the time Mr. Reichwine was away?

A. Yes, sir.

Q. And you had been familiar with the account for some time prior to the time Mr. Reichwine left on his vacation?

A. In general, yes, sir.

Q. And you knew the business of the United Produce Company both from your immediate experience as a loan officer in charge of the account temporarily while Reichwine was away and from your general acquaintance with the account prior to his departure for his vacation?

A. I thought I did.

Q. If your understanding of this explanation given in Tague's memorandum was correct, that is, if Lofendo was buying, and if the United then sent its checks for the amount of the purchase, and if Lofendo then shipped and sold and collected the purchase price and sent his check to United for the purchase price, you knew if that was going on, Mr. LeRoy, that the United Produce Company was not handling the produce at all, [578] but Lofendo was; that is correct, isn't it?

A. Let me get this straight. Counsel has me temporarily confused. The United Produce Company sent the money to Lofendo first?

Q. It says here: "Lots of grapes are purchased by the grower for cash." The grower is Lofendo, that is correct, is it not?

A. Yes, sir.

Q. Or Mazzi Farms or Jack's Fruit Company, either one of the three?

A. All right.

(Testimony of Allen R. LeRoy.)

Q. "United Produce Company is immediately advised of the purchase and forwards the cash." That is to Lofendo. A. Yes.

Q. "The car or cars are then shipped to the customer of the agent"—Lofendo—"and upon collection of the amount due, the agent sent his check to the United Produce Company."

A. That is right.

Q. That is what it says? A. Yes.

Q. Now, I am asking you, Mr. LeRoy, if that was true; it was the agent or Lofendo who was actually buying and shipping the merchandise; that is correct, is it not?

Mr. Lasky: If the Court please, what is the materiality of this witness' understanding?

The Court: If that is so, it is a deduction that the Court can make from the document, isn't [579] that so?

Mr. Erskine: That is right, your Honor, but I want to show that in view of the witness' knowledge of the United Produce Company's business, he could not possibly have accepted that as a satisfactory explanation of what was going on, and that nevertheless he permitted it or the bank permitted it to go on.

The Court: Very well, continue.

A. That is correct, counsel.

Q. (By Mr. Erskine): And the agent or Lofendo was actually receiving the proceeds of the sale; that is correct, is it not? A. Yes, sir.

Q. And the agent or Lofendo was actually ship-

(Testimony of Allen R. LeRoy.)

ping the car and handling the bill of lading and getting the delivery or issuing a delivery order for the car; that is correct, isn't it?

A. I wouldn't know what he did with it. He was handling the sale of it.

The Court: May I interrupt you a moment? As you were assigning a description to Lofendo in the memorandum, you assigned him as an agent.

Mr. Erskine: That is how he is referred to.

The Court: And as a grower.

Mr. Erskine: And as a grower. The terms are used synonymously.

Mr. Lasky: No, they are not used synonymously.

Mr. Erskine: It says "by the grower, parenthesis or agent."

Mr. Lasky: But he has listed elsewhere three different [580] people, and some might have been growers and some might have been agents.

The Court: That is what I wanted to understand. For the purposes of your cross-examination you are giving him the appellation of agent and grower?

Mr. Erskine: Yes, sir, one and the same thing.

Q. That is what you understood this to mean, was it not, Mr. LeRoy? A. Yes, sir.

Q. From your knowledge of the situation, Mr. LeRoy, you knew that the United Produce Company was discounting drafts in large sums drawn by it on various people to whom it purported to ship merchandise; that is correct, is it not?

A. Yes, sir.

Q. And you knew that accompanying those drafts

(Testimony of Allen R. LeRoy.)

or when they were discounted at the bank the United Produce Company would give the bank what is called a delivery order directing the delivery of the car to the person named in the draft; that is correct, is it not?       A. In some cases, yes.

Mr. Lasky: If the Court please, this has gotten even beyond I understood the answer to bring up. I do not see what bearing this has on the claim that somehow through negligence we permitted or knew a kite was going on. This has got me lost. I object to its materiality. [581]

The Court: I confess I am not following through myself. What is the purpose here?

Mr. Erskine: The purpose is this, your Honor: the explanation of the kite was, as the witness stated, as given in this statement by Tague in his report. The statement is that the reason for the checks on both side was this:—

The Court: As explained by that draft.

Mr. Erskine: Yes. Lofendo—we will take Lofendo as the grower or agent—Lofendo bought some merchandise. The United Produce Company reimbursed him for the purchase. Lofendo then shipped the merchandise, sold it, got the proceeds, and reimbursed the United Produce Company. Now, if that sort of a situation was presented it would mean that the United Produce Company was not selling the merchandise, it was not shipping the merchandise, the proceeds of the sale would not become due to it, it would have nothing to do with the transaction except to finance it by paying Lofendo the

(Testimony of Allen R. LeRoy.)

price. Now, I want to show from this gentleman's knowledge of the business that the United Produce Company was carrying on, that that explanation could not possibly have held a drop of water to it. That is the purpose.

Mr. Lasky: It could not do what? I did not understand what you last said.

Mr. Erskine: I said that from Mr. LeRoy's knowledge of the business in which the United Produce Company was engaged, [582] the fact that it was selling the produce, that it was shipping, that it was collecting the proceeds, the fact that it was doing all those things made it absolutely impossible for him to believe this explanation, which stated that Lofendo was doing it.

Mr. Lasky: They had other accounts that they were selling directly through.

The Court: You mean to say that because he knows in other matters they handled business deals in a different manner, that he was to understand that it could not possibly be handled this way?

Mr. Erskine: Yes, your Honor. These brokerage transactions as the report stated, amounted to very substantial sums of money. As this report states, in the three months——

The Court: Yes, but do you mean that because the witness knew that the United Produce Company carried on some business transactions differently than it stated in the memorandum, your purpose is then for the Court to draw the conclusion that what

(Testimony of Allen R. LeRoy.)

appears in the memorandum could not possibly have been believed?

Mr. Erskine: That is right.

Mr. Lasky: Because they had other accounts one way, they could not have one account a different way.

The Court: I do not think it follows.

Mr. Erskine: I think it at least gives rise to inference [583] in my opinion. The report states that these brokerage transactions were carried by the United Produce Company as pre-season advances, as the report states. During the three months of July, August and September it shows that the amounts paid by the United Produce Company in these brokerage transactions came to the huge total of \$1,976,285.62, that the receipts from those transactions carried on in the way described in the memorandum came to \$1,858,010.33. Now, I say from this gentleman's knowledge of the United Produce Company it was absolutely impossible for him to find satisfactory a report to the effect that transactions in those amounts were carried on in the way in which the memorandum describes them. That is the purpose.

The Court: Well, of course, I can't follow. It just is not seeping through on me, counsel. Your contention is that this witness knew of certain transactions of the United Produce Company, understood how the United Produce Company carried on certain of its business.

Mr. Erskine: He knew, your Honor, that all of



(Testimony of Allen R. LeRoy.)

its accounts receivable were being assigned to the bank as collateral. He knew that the United Produce Company was discounting drafts in large sums of money with the bank every month.

The Court: He knew that so much of the business of the United Produce Company was carried in a particular manner, that it was impossible for the business between the United Produce Company and Lofendo to be carried on in the manner described, is [584] that it?

Mr. Erskine: That is right, business in these large figures.

Mr. Lasky: The argument just does not make any sense. They sent out an investigator to find out why the stuff is not coming into the assigned receivables account. And an auditor reports that here are three accounts of a different character of business. Does that mean the witness it to conclude there just could not be three accounts like this? It does not add up logically.

The Court: Counsel can go ahead with his theory and present his evidence.

Q. (By Mr. Erskine): At any rate, Mr. LeRoy, to get back to my line, this report states, does it not, that these transactions in which the checks appeared on both sides, these pre-season advances, as the designation on these brokerage transactions appears, aggregated during the months of July, August and September as advances to the grower \$1,976,-285.62, and that the receipts came to \$1,858,010.33; that is correct, is it not?

(Testimony of Allen R. LeRoy.)

A. Well, it was a very large amount. I will accept that. That is correct.

Mr. Lasky: I will stipulate that is what it says on the paper.

Mr. Erskine: Yes, that the brokerage transactions carried as pre-seasonal advances giving rise to checks on both [585] sides amounted to those sums.

Q. Now, Mr. LeRoy, the United Produce Company was in the business of selling produce, was it not?

A. Yes, sir.

Q. Shipping it?

A. Yes, sir.

Q. Assigned accounts receivable arising out of the shipments to the bank as collateral?

A. Yes, sir.

Q. And discounting drafts for the purchase prices of produce sold by it; that is correct, is it not?

A. That is correct.

Mr. Lasky: Why must the witness be asked questions on which we have stipulated?

The Court: It is all stipulated.

Mr. Erskine: It shows the knowledge of the witness, according to my feeble intelligence.

Q. But you understood, did you, Mr. LeRoy, that so far as these transactions were concerned, referred to in this report, in which the pre-season advances came to the sum that I have mentioned, that is, the amounts sent out to the grower and the receipts to the United Produce Company came to the sum that I was mentioning, that the United Produce Company was not doing any of these things?

(Testimony of Allen R. LeRoy.)

A. They were merely taking a chance on that, acting as brokers, [586] which was a part of their business.

Q. They were financing the transactions, is that right?

A. Not in total, all at the same time, but they were not strictly pre-season advances, but they put the money out in order to enable Lofendo to buy them and then they were reimbursed and for that—they might have got a small commission.

Q. And in that transaction, Mr. LeRoy, no accounts receivable was created in favor of the United Produce Company?

A. Not where they would be handled purely as a brokerage.

Q. And the bank was taking as security for these loans the assignments of accounts receivable, all accounts receivable?

A. From other transactions.

Q. And the bank was willing to permit the United Produce Company to finance transactions aggregating in those three months practically two million dollars without the bank receiving any collateral out of the transaction, is that right?

A. They would not get any collateral if they were handled as brokerage transactions.

Q. I am asking you, Mr. LeRoy, the advances made by the United Produce Company in these transactions, according to this report, amounted to two million dollars?

A. That is right.

Q. In the three months, July, August and Sep-

(Testimony of Allen R. LeRoy.)

tember, the United Produce Company got no accounts receivable out those transactions which it could assign to the bank to secure the loans [587] being made?

A. I do not know that they didn't get any——

Q. What is that?

Mr. Lasky: Just a moment. I would like to have that question read so I will understand what it is all about.

Mr. Erskine: If you would not interrupt me, counsel—I think I should be permitted to go along as best I can. It may not be very good but it is the best I can do.

The Court: The Court will determine this matter.

(The last question was read by the reporter.)

Mr. Erskine: Your answer to that is no, it could not have?

A. It could have gotten some; where there were brokerage transactions, none.

Q. How could it have gotten any accounts receivable out of these transactions if the agent or grower was making the sale and collecting the proceeds?

A. They could have been through a third party, and the transaction come in and the money collected. It was confused it would be possible. [588]

Mr. Lasky: I will stipulate that there was no account receivable that United Produce could assign.

(Testimony of Allen R. LeRoy.)

The Witness: From those transactions.

Mr. Erskine: You will stipulate that in these transactions during those three months amounting to advances by the United Produce Company to the grower or agent practically two million dollars, that in those transactions no accounts receivable were created which were assigned to the bank as collateral?

Mr. Lasky: I said I will stipulate that if there was that kind of transaction where there is nothing owing to the United Produce Company, then the United Produce Company had no account to assign.

Q. (By Mr. Erskine): Mr. LeRoy, when you saw this report showing that the United Produce Company was financing transactions of that sort and was laying out in these transactions for the period of three months practically two million dollars, did you consider that a satisfactory report?

A. Report covering those transactions perhaps, but if counsel will go further, he will find out what our remedy for that was to be.

Q. I am, first of all, inquiring into your state of mind with respect to this report and whether or not this explanation was a satisfactory explanation of the checks on both sides?

A. It covered, yes, sir.

Q. You regarded it as satisfactory? [589]

A. The bank did; and in that I will say the committee handling it, Mr. Redheffer and myself.

Q. You were in charge of the account?

(Testimony of Allen R. LeRoy.)

A. I was. And if counsel will go on further he will find out what remedy I suggested.

Q. I am coming to that. Now when Tague submitted this report to you Mr. LeRoy, did you ask him what he understood it to mean, that is, that portion of it dealing with these brokerage transactions and the checks on both sides?

A. You mean did I break it to pieces the way you have done? No, I didn't.

Q. I didn't ask you that. I asked you whether or not you asked Tague what the report meant, according to his understanding?

A. I asked him for an explanation about it, yes.

Q. And did you receive a satisfactory answer from Tague to that inquiry?

A. He answered just about what is in the report, counsel.

Q. Did you understand what he had to say in answer to your inquiry?

A. I understood what he had to say, but frankly, I didn't understand the full transaction, no.

The Court: I think the court will stand in recess for ten minutes.

(Recess.)

Mr. Erskine: Now, will you read the last question and [590] answer, Mr. Reporter?

(Reporter read the last question and answer.)

Q. (By Mr. Erskine): In other words, what I understand you to say by that answer is that you did not understand Mr. Tague's explanation?

(Testimony of Allen R. LeRoy.)

A. That's right.

Q. I believe that you have said that you asked Tague to make a complete investigation of the books because you wanted an explanation of the checks on both sides; that is what you testified to as I have understood you.

A. That is correct.

Q. And when you gave those instructions to Tague you told him that you wanted an investigation of the entire situation, did you not?

A. I didn't give the instructions to Mr. Tague; Mr. Rudolph did. I talked to Mr. Rudolph.

Q. On page 187 of your deposition the testimony you gave is as follows:

“Q. Did you take any action with reference to the account after this Defendant's Exhibit 6 was called to your attention?

“A. I did.

“Q. What was that action?

“A. Investigation as to the amount of outstanding uncollected items, and I also sent Mr. Tague to the office [591] of the United Produce Company to investigate the whole situation with respect to any checks which were appearing payable to their order from California.”

You gave that testimony?

A. I accepted that as what was done, yes. I might have done it personally or through Mr. Rudolph. He was sent down there at least. [592]

Q. At any rate, Tague was sent down there to investigate the whole situation, was he?



(Testimony of Allen R. LeRoy.)

A. That is correct.

Q. And then when Tague made his report, as I understand you, you either couldn't understand it or you didn't find it entirely satisfactory; that is right, isn't it?

A. That is indicated because there were other measures that were taken there at the time.

Q. All right. After you considered Tague's report you asked Mr. Rosenthal of United Produce Company to come into the bank to have a talk with him, did you?

A. Yes, sir.

Q. And that was on October 2nd, that you asked Mr. Rosenthal to come in, and he appeared on October 4th as indicated by the memorandum that appears at the bottom of this statement?

A. That was the way I remember it, yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. That handwriting appearing at the bottom of this memorandum of October 1 is your handwriting?

A. Yes, sir.

Q. And Mr. Rosenthal came in to see you, did he, Mr. LeRoy?

A. Yes, sir.

Q. Tell us what conversation you had with Mr. Rosenthal at that time? [593]

A. Mr. Rosenthal I immediately took over to Mr. Redheffer, and the three of us talked about the entire matter, and in the conversation Mr. Redheffer told Mr. Rosenthal that we wanted to go along and help him work out the situation, and I suggested as indicated at the bottom of the report there, that arrangements be made to allow him to use the funds

(Testimony of Allen R. LeRoy.)

immediately through the use of telegraph transfers.

Q. In that conversation did Mr. Rosenthal tell you what this report says: That Gassman told Tague substantially about the same thing about the explanation of the checks on both sides?

A. He reiterated——

Q. What is that? A. Pardon me?

Q. I didn't get that.

The Court: He interrupted you.

Mr. Erskine: Pardon me.

Q. Did Mr. Rosenthal in his discussion with you and Mr. Redheffer tell you, in explanation of the checks on both sides, substantially the same *time* that according to the Tague report that Mr. Gassman told Tague.

A. As I remember it, yes, sir.

Q. And what did you reply to Mr. Rosenthal when he told you that, Mr. LeRoy?

A. If I remember correctly, I told him I didn't understand it.

Q. I will ask you if you didn't give this testimony at page 151 [594] of your deposition.

“Q. Tell us the conversation between you and him at that time.

“A. In substance it was that he said that they paid out these funds for grapes, and then they sold and the proceeds were received by their agent, who was one of the three people referred to, and the agent remitted the money to them.

“I said, ‘Well, that is very nice, if that the

(Testimony of Allen R. LeRoy.)

case, but have those funds deposited in the Bank of America branch for the credit of the Merchandise National Bank of Chicago, for the United Produce Company, and they will arrange for telegraphic advice to us, and the funds will be immediately available.' "

Is that the testimony you gave?

A. Yes, sir.

Q. When you said to Mr. Rosenthal: "Well, now, that is very nice, if that the case," did you believe the explanation he was giving you?

A. I didn't understand it.

Q. But at that time you did tell Mr. Rosenthal that you wanted the United Produce Company whenever it was to receive a check drawn on a California bank for funds, you wanted those funds deposited to the credit of your bank and the California bank [595] and you wanted advice of that fact wired by the California bank to your bank?

A. I did if they were to make immediate use of the funds, yes, sir.

Q. That is what you told Mr. Rosenthal that you wanted done? A. Yes, sir.

Mr. Erskine: Have you got Mr. Messenger's memorandum of October 6th? It was Exhibit 43b upon the taking of his deposition?

Mr. Lasky: You are not referring to the memorandum of Mr. Messenger; you are referring to something marked as an exhibit on his deposition.

Mr. Erskine: Yes, that is right.

(Testimony of Allen R. LeRoy.)

Mr. Lasky: 43a.

Mr. Erskine: 43a and b. These are the same thing, aren't they?

Mr. Lasky: Yes.

Mr. Erskine: Yes, I see, the same thing. One has initials and the other not. That's right.

Q. Did the United Produce Company carry out those instructions, that whenever they wanted to draw against uncollected funds arising out of checks drawn on the California bank, or whenever they wanted to draw on such funds, that they should have the funds deposited to the credit of the Merchandise Bank and the California Bank and the Merchandise Bank advised by wire? Did [596] Mr. Rosenthal, or United Produce Company, I mean, carry out those instructions?

Mr. Lasky: Just a moment. I object to that question as assuming something that he hasn't said. He is referring to something as "instructions." The witness has testified to no instructions; he has testified to a procedure that he suggested be followed.

The Court: Yes, that's right.

Mr. Erskine: Substituting "procedure that you asked to followed" for the words "instructions" give your answer to the question with that substitution.

A. Mr. Rosenthal never to my knowledge made any such arrangement.

Q. But the United Produce Company continued after October 1st to draw on uncollected funds, did it not, until, say, October 18th or thereabouts?

A. On October 18th as I remember it, yes, sir.

(Testimony of Allen R. LeRoy.)

Q. And while it was drawing on uncollected funds the arrangement that you suggested with respect to telegraphic advice was not put into effect?

A. No, sir; I think he was given a week in the first place, and then an additional week. I think the records show that.

Q. I show you a paper that was marked on the Chicago depositions as Defendant's Exhibit 42-b on the taking of the Messenger deposition, which appears to consist of three memorandums, [597] October 6th, 11th and 14th, and I will ask you if that memorandum or that sheet shows memorandums prepared by you as of those three dates?

Mr. Lasky: Can't we stipulate that it does?

Mr. Erskine: All right.

The Witness: They do.

Mr. Erskine: I will accept the stipulation, certainly.

I will ask that this be marked for identification.

Mr. Lasky: On all of these documents, Mr. Erskine, we can stipulate what they are.

Mr. Erskine: I want the witness to take a look at that. I have a few questions to ask about them.

The Clerk: The Defendant's Exhibit T for identification.

(The sheet of paper containing the three memorandums referred to was marked Defendant's Exhibit T for identification.)

Mr. Erskine: So according to this memorandum,

(Testimony of Allen R. LeRoy.)

Mr. LeRoy, you had another conversation with Mr. Rosenthal on October 6th in which you told him that your bank, the Merchandise Bank, could arrange to have these funds deposited in the Bank of America direct to our credit and United Produce Company advised, and Mr. Rosenthal stated that he would get the matter adjusted within one week, October 13, 1948, so that future drawing on uncollected funds would not be necessary. That was what was said between you and Rosenthal on that day, October 6th, was it?

A. According to the memorandum, yes, sir, and such a conversation [598] was had.

Q. That is your best recollection of what took place?      A. Yes, sir.

Q. There are initials immediately following that, "F U 10/13/48." That means "Follow up on October 13, 1948," doesn't it?      A. Yes, sir.

Q. On October 13, 1948, had United Produce Company ceased to draw against uncollected funds?

A. No, not in an entirety, at least.

Q. The initial appearing on those sheets, Defendant Exhibit T, this "J," whose initial is that on the right hand of the sheet?

A. That is Mr. Reichwine's as of 10/18.

Q. In other words, when Mr. Reichwine returned from his vacation he was shown this memorandum?

A. Yes.

Q. And initialed it, is that right?      A. Yes.

Q. This note says "follow up October 13." Did

(Testimony of Allen R. LeRoy.)

you follow up on that date or thereabouts the situation?

A. As I remember it, we did, and then it was deferred until the 18th.

Q. As indicated by the last memorandum on this sheet, Defendant's Exhibit T, you had a talk with Mr. Rosenthal about the situation on October 14th, didn't you?

A. Frankly, I don't remember, counsel. [599]

Mr. Erskine: I will show you.

Mr. Lasky: I will stipulate that if it says so in that memorandum on the bottom, it is so.

(The paper was handed to the witness.)

A. Yes, sir.

Q. (By Mr. Erskine): Prior to seeing Mr. Rosenthal on October 14th did you make a check to determine whether or not the United Produce Company was still drawing on uncollected funds and whether or not Lofendo and United Produce Company checks were on both sides of the account? Did you make a check to determine those facts?

A. Yes; I kept a running check, as I remember it.

Q. And you found that during that period of time checks on both sides appeared and that United Produce Company had continued to draw on uncollected funds?

A. To some extent.

Q. That is, during the period from your first conversation on October 6th, to October 14th, is that right?

A. Correct, sir.

Q. And when Rosenthal came into the bank on



(Testimony of Allen R. LeRoy.)

October 14th you told him what appears there substantially in this memorandum, or rather he stated that he would have the situation of drawing on uncollected funds by Monday, October 18th, so that it would not be necessary for them to draw checks against uncollected items, and Mr. Redheffer concurring he was advised that we would [600] continue our present arrangement until that date when it will be automatically terminated. That was the conversation between you, Redheffer and Rosenthal?

A. Yes.

Q. Now, the "present arrangement" to which you referred, is the arrangement carried on by the United of drawing against uncollected funds; that is correct, isn't it?

A. Yes, sir.

Q. Did you make an actual investigation to determine how much the float was in this account during that period, October 1, say, to October 9th?

A. I did at the time through one of the clerks, Mr. Eiler, but I do not recall what the figures were at this time.

Q. The expression "float" means the drawing by a customer of checks on a bank account before the collections of funds deposited to his account?

A. In that particular case it was before the arbitrary time in which we estimated collections would be made had elapsed.

Q. But "float" is synonymous in bank practice with uncollected funds, isn't it?

A. Not exactly, no.

Q. What do you mean by "float"?

(Testimony of Allen R. LeRoy.)

A. Float is the amount of checks which have not been deposited against an account. For instance, if you have a thousand dollars that is shown on your books, a thousand dollar balance [601] in the bank, the bank may show \$2,000, representing checks which have not been charged to that account. The thousand dollars is float.

Q. That isn't entirely clear to me.

Mr. Lasky: There are many matters this afternoon that have not been clear to me.

Mr. Erskine: I am just trying to enlighten you, Mr. Lasky. I may not be making a good effort but I am trying.

Q. Do you know whether or not on October 18th the United Produce Company did continue drawing against uncollected funds?

A. That I couldn't say definitely.

Q. On October 18th you turned the account back to Mr. Reichwine? A. Yes, sir.

Q. And from that time on Mr. Reichwine had the duty of supervising the account, is that right?

A. That is correct.

Q. Isn't the way this sort of account is handled in the banks is substantially this, is it not: that an account of this sort in which the bank is lending money to a customer is supervised by one of the loaning officers of the bank? A. Correct.

Q. You were such a loaning officer, so was Mr. Reichwine? A. That is right.

Q. And it is the duty of the loaning officer to

(Testimony of Allen R. LeRoy.)

supervise the account, to see that the commitment is being properly used by his customer and to see that the customers is meeting his [602] obligations, with respect to the loan? A. That is correct.

Q. In other words, it is the duty of the loaning officer, to use the language which you used in Chicago, to police the account?

A. That is correct.

Q. Mr. LeRoy, you have testified, as I have understood you, that you noticed the checks on both sides and you noticed the fact that the company, the United Produce Company, was drawing against uncollected funds, and for those reasons you directed Tague, you had Rudolph direct Tague to go down there and make a special investigation of the books of the company; that is right, isn't it?

A. I have so testified.

Q. Then you got this report that has been introduced in evidence, Tague's report of October 1st, marked Defendant's Exhibit R, that is right, isn't it?

A. I got a report if that is the report.

Q. Yes. And then you had your talks with Rosenthal to which you have just testified?

A. Yes, sir.

Q. Now, I want to find out, Mr. LeRoy, if besides Tague's report of October 1st and your talk with Tague about the report and your talks with Rosenthal which you have related, you did anything else or caused anything to be done to investigate this [603] matter of checks on both sides and this drawing on uncollected funds?

(Testimony of Allen R. LeRoy.)

A. I can't recall anything else.

Q. According to your best recollection that is all you did?      A. Yes, sir.

Mr. Erskine: I have reached another subject in my cross-examination, your Honor, shall I proceed or shall I——

The Court: I think you might as well proceed. How much longer do you think you will take with this witness?

Mr. Erskine: I think I will take at least an hour more.

The Court: Very well; proceed.

Q. (By Mr. Erskine): Now, Mr. LeRoy, I call your attention to the memo dated October 11th, which says this:

“A reconciliation of the drafts and accounts of this company showed that we had discounted drafts in the amount of \$122,298, against Alfinito and \$109,233 against Feldbaum, in addition to \$78,000 accounts receivable for both Alfinito and Feldbaum. In view of the fact that we have \$475,000 total accounts receivable of which \$156,000 consists of the Alfinito and Feldbaum accounts, it was felt that concentration in receivables would not affect our position, but Mr. Rosenthal was advised that in the future we would not accept drafts against any one concern in excess of \$10,000.”

Mr. Lasky: It says a hundred here. [604]

Q. (By Mr. Erskine): “In excess of \$100,000.” Now the expression in this memorandum “accounts

(Testimony of Allen R. LeRoy.)

of this company," the expression which I have just read to you, that means accounts receivable of United Produce Company, assigned to the bank, does it not?      A. That is correct.

Q. And this memorandum indicates, does it not, that the drafts discounted by the bank for the two concerns indicated Feldbaum and Alfinito, had been compared with the accounts receivable assigned to the bank as collateral for the loan, and that such comparison showed that the bank had discounted drafts against Alfinito in the sum mentioned \$122,298 and against Feldbaum in the sum of \$109,233, and that in addition it had taken as collateral assignments of accounts receivable owing by Alfinito and Feldbaum to United in the amount of \$78,000? That is what it showed, did it not? [605]

Mr. Lasky: If your Honor please, I object to inquiry on that particular memo because the memo and the subject matter doesn't seem to have any bearing even upon the defenses or the counter claims; it seems to be straying even from them.

Mr. Erskine: I am coming to that, your Honor, trying to.

The Court: Very well; proceed.

A. Is that what it says on the memo?

Mr. Erskine: Yes.

A. Then I agree.

Q. In other words, a comparison was made between the drafts drawn, or rather drafts discounted by the bank drawn on Alfinito and Feldbaum with

(Testimony of Allen R. LeRoy.)

the amount of accounts receivable assigned by those firms to the bank, is that right?

A. If counsel means did I state that a certain number of Alfinito and Feldbaum accounts receivable were accepted as security and that a certain number of drafts drawn against those firms were discounted, that is what I meant.

Q. I am just asking you if that was what was done, what you had caused done, or what was brought to your notice: that is, that a comparison was made between the drafts discounted by the bank which United Produce Company had drawn on those two firms and the amount of accounts receivable assigned by the United Produce Company of those two firms to the bank as collateral.

A. You can call it a comparison if you wish; the amounts were [606] given there.

Q. The point to which I am coming, Mr. LeRoy, or the point which I am trying to bring out is that from time to time, according to the practice of the bank, an investigation was made of the drafts discounted and the amount of accounts receivable assigned for the purpose of determining the amount of the drafts of any one customer of the United being discounted by the bank for the United Produce Company and the amount of accounts receivable of any one customer of the United Produce Company being assigned to the bank; that is correct, isn't it?

A. That wasn't the purpose of it. The purpose of it—there was a limitation placed on the amount

(Testimony of Allen R. LeRoy.)

of the drafts for any one firm, Feldbaum or Alfinito, that we would accept.

Q. In other words, that limitation in the case of Alfinito and Feldbaum was \$100,000?

A. As I remember it, yes, sir.

Q. And you did that to avoid what is known in the banking language as a concentration in drafts of those firms; that is right, isn't it?

A. Is that correct.

Q. And the same investigation was made of accounts receivable?

A. No, sir; there was no effort made to make—effect a comparison between the two, although naturally the total liability was gotten at the same time.

Q. The memorandum of October 11th does refer to the fact that [607] there had been assigned to the bank accounts receivable of Alfinito and Feldbaum aggregating \$156,000; that is right, isn't it?

A. Yes, if that is what it says in amount.

Q. And that check evidently was made at that time, is that correct?

A. Yes, sir.

Q. After you had discovered or after it had been reported to you that the bank was discounting drafts of the United drawn on these two firms in the amounts mentioned in this memorandum, and after you had discovered that these two firms, or rather that United had assigned accounts of these two firms to the bank as collateral, you called in Mr. Rosenthal to discuss those concentrations with him, did you not?



(Testimony of Allen R. LeRoy.)

A. I don't know whether I called him in or talked to him on the telephone.

Q. But at any rate you talked to him about it, did you?      A. Yes, sir.

Q. And you told Mr. Rosenthal that your branch would not discount drafts for either one of these concerns, Alfinito or Feldbaum, in excess of \$100,000, is that right?

A. You mean drafts against those concerns?

Q. Yes, drafts against those concerns.

A. Yes, sir.

Q. And you told him that he should get his commitments on [608] such drafts down to that figure of one hundred thousand dollars?

A. That is correct.

Q. And you knew at that time that the bank had notified the United Produce Company to the same effect; that is, that it would not discount the drafts on either one of these concerns in excess of \$100,000?

A. Yes, sir; they had been notified several times prior to that.

Q. So it was the task of some officer or employee of the bank to check up from time to time to determine the concentration in these drafts being discounted by the bank for the United Produce Company?

A. We didn't have to check up; it showed up on the daily liability register.

Q. While you were in charge of this loan, you knew, did you not, Mr. LeRoy, that the United

(Testimony of Allen R. LeRoy.)

Produce Company was executing to the bank assignments of accounts receivable as collateral for new loans which were being made from time to time by the bank to it?

A. Certainly because that was—they were according to the general assignment agreement, they were supposed to assign all of their receivables.

Q. And those assignments were made from time to time, what we call the interim assignments during each month, were they not?

A. That is correct. [609]

Q. And then at the end of each month a so-called trial balance monthly assignment was made under which the United Produce Company assigned to the bank all the accounts receivable of the company then in existence?

A. As indicated by balances, that is correct.

Q. That is right. And specifying the accounts receivable, listing them?

A. That is correct, by balances.

Mr. Lasky: We are covering all this by stipulation, aren't we?

Mr. Erskine: The question is preliminary. I want to find out something from the witness with respect to these assignments.

Q. While you were in charge of this account you from time to time examined the interim assignments and also the monthly trial balance assignments, did you not?

A. I saw one monthly trial balance assignment during that time, yes, sir, and I assume that I saw

(Testimony of Allen R. LeRoy.)

an assignment, interim assignment, practically every week day.

Q. It was part of your duty as the loaning officer in charge of this loan to do that, was it not, Mr. LeRoy?      A. If I passed on the loan.

Q. Yes.      A. The interim loan. [610]

Q. You say you did see one of what we have called the trial balance monthly assignments executed by the United to the bank; that is correct, is it?

A. Yes, sir. I should have seen it. I do not recollect anything about it in particular. It might have been that one or another of the owning officers handled it at the end of the month.

Mr. Erskine: I would like to have the monthly trial balance assignment that was executed by the United Produce Company to the bank towards the end of September, 1948. Will you produce that, Mr. Lasky?

Mr. Lasky: I have it here, but I submit—I won't offer it in the form of an objection but I submit this is too remote. We are getting back a month and a half prior to any controversy in this case. This is October 2nd, and there must be 45, 50 or 60 of these that intervened.

The Court: Intervened?

Mr. Lasky: Yes.

Mr. Erskine: The purpose, your Honor, is this, according to my information: This statement would show, however—I may be incorrect in this and I'll have to check it up—this statement will show

(Testimony of Allen R. LeRoy.)

that at the end of the month of September or the first part of October, at the very time that this investigation was being made by Tague, a monthly trial balance assignment was executed by the United Produce Company to the bank, and that that monthly trial balance showed that at the end of October [611] 1948——

Mr. Lasky: September?

Mr. Erskine: No, at the beginning of October, October 2nd 1948, Lofendo had signed accounts receivable to the bank aggregating—I do not know exactly how much—my figures here, my notes show aggregating \$43,305. That may be wrong. That is subject to check. That was during the month of September, 1948, the bank had received the checks of Lofendo on account of the accounts receivable aggregating \$341,350.30, or 44 per cent of the total payments were received during that month, and I want to find out from this witness whether or not he knew those facts and whether or not Mr. Tague, mentioned his special audit the report of which was dated October 1, and referred his contention to that fact.

Mr. Lasky: I submit to the Court it is immaterial because it is too remote.

The Court: It occurs to me that it is remote, counsel. The method of handling the account and the investigation of it occurred about this time, so anything that went on at least prior to the investigation does not make any difference here, does it, under your feeling?

(Testimony of Allen R. LeRoy.)

Mr. Erskine: Oh yes it does, your Honor. In other words if the trial monthly assignments showed that there were in existence assignments from Lofendo as of October 2nd, 1948, of something like \$43,000, at that during the month of September the [612] bank took checks of Lofendo on account of accounts receivable aggregating the tremendous total of \$344,000, I believe that if those facts developed that they show that something was radically wrong in the operation of this bank, and they ought to have realized on October 1st, when the investigation was made, that that tremendous concentration of payments of \$344,000 from one debtor, when the figure showed that debtor had only assigned a moderate amount of accounts receivable—that that tremendous concentration of payments should have shown them that something crooked was going on, and that when they sent their wire of October 20th to the Bank of America, referring the Bank of America to their letter of September 22nd, that said everything was rosy, there was something radically wrong with the operation of the bank.

The Court: So far as that is concerned, whether it is material or not, you can agree upon the facts.

Mr. Lasky: We certainly should be able to stipulate to anything shown by papers like this.

The Court: For the last hour and half I have heard little that I can think of that has not been stipulated to. It seems to me that as surely as what those records show in September if they are material, they can be stipulated to.

(Testimony of Allen R. LeRoy.)

Mr. Erskine: If we can stipulate to the facts——

The Court: You are not getting them to stipulate to the facts that they were negligent. [613]

Mr. Erskine: We can probably stipulate to the fact that during the month of September the Merchandise Bank refused Lofendo's checks on account of the accounts receivable aggregating \$344,000. Now, I want to find out if this witness knew about that, and if that is a preliminary question.

The Court: If you make your stipulation and then all you have to do is ask him if he knows, and that ends it. I have not quite followed you through, counsel, but you attach importance to it, and I will listen to your arguments later in your memorandum and so forth. I am going to permit you to go ahead, but I wanted to do it——

Mr. Erskine: I want to expedite it, your Honor, as much as I possibly can, but your Honor, I am sure, appreciated my position in this litigation. I have spent an enormous amount of time and effort it, and so have my associates. I firmly believe that we are 100 per cent right. The facts we are going to show are simply astonishing.

The Court: Of course, but as to what the facts are with respect to these matters and, as I say, most of the things that you have inquired about in the last hour and a half could have been stipulated to so far as facts are concerned—as to what you argue comes from the facts is a different matter.

Mr. Erskine: Perhaps that is so, the court please, and I certainly want to defer to the Court. But I



(Testimony of Allen R. LeRoy.)

do not think we could get a stipulation from the other side that that report of [614] October 1st was a report that on its face was extremely unsatisfactory, and that is what I was attempting to show. I want to find out this witness whether he knew about Lofendo's concentration of payments from Lofendo.

The Court: This witness did not say the report on its face was extremely unsatisfactory. Those are things you are going to ask the Court to draw conclusions from.

Mr. Erskine: Yes, but I tried to get the facts from a report that indicates that the report must have been unsatisfactory. That is the purpose of my examination, and I believe that to be so, and the witness himself, according to my understanding of it, practically said that.

The Court: He said he was satisfied with it. That was his position and I can't understand why a stipulation could not have been secured. But go ahead and proceed.

Mr. Erskine: I do not want to be placed in this position, your Honor. I do not want to be placed in the position where I feel that I am irritating the court. That is not a position any lawyer wants to get into, and I do not want to get into that position but at the same time I feel I must try my case according to my likes.

The Court: Don't worry about that at all, because you are not going to be in that position. The thing that I keep wanting you to do is to make the effort in the first place to make the stipulation. If



(Testimony of Allen R. LeRoy.)

you cannot do it, that is very fine [615] with me. We will sit here from now until next Christmas to get all the evidence if you can't make the stipulation, proceed.

Mr. Erskine: I will try to come to it more rapidly this way.

Q. Did you know, Mr. LeRoy, that during the month of September checks of Lofendo drawn to the order of United Produce Company were received with the remittances on account of accounts receivable assigned to the bank? Was that fact called to your attention—checks in the sum of over \$300,000?

A. No, I did not attach any importance to it. I knew that some large amounts were received. But counsel, I might suggest the fact that there was only \$46,000 shown on the 7th of the month, which was the time of the new trial balance, and the fact that \$376,000 in checks had been received during the entire month of September does not represent anything he says the representation was made, according to that report, that it was a great season. Accounts were turning over very rapidly and those accounts only were outstanding a very short number of days. And so consequently there could have been \$46,000 at the beginning of the month and still there could have been \$376,000 and some paid during the month.

Q. Now, Mr. LeRoy let me see if I understand you: During the month of September the records show—I will ask counsel to stipulate—that the bank

(Testimony of Allen R. LeRoy.)

received from debtor's owing accounts receivable \$777,629.89. [616]

Mr. Lasky: You take up the stipulation with me outside the courtroom where I can see the figures. I can't pick them out of the air.

Q. (By Mr. Erskine): I'm just asking your opinion as a banker. Assuming that the total checks received by the bank from debtor's owing accounts receivable was that figure of \$777,629.89, and assuming also that of that total \$341,350.30 were in Lofendo's checks—in other words, approximately 44 per cent of the total—in your opinion as a banker did that reflect a healthy situation?

A. Not a healthy situation. Concentrations are never healthy.

Q. That is an extreme concentration, isn't it?

A. Not extreme perhaps but it is a concentration and it is not healthy, but it is entirely possible to have it and have it be a perfectly valid transaction.

Q. In the case of the drafts of Felbaum, drafts drawn by United on Felbaum and discount is by the bank in excess of \$100,000, that was regarded as an unhealthy concentration, is that not so?

A. At any one time, yes.

Q. Do you testify that assuming hypothetically that the payments received, that checks of Lofendo on account of the accounts receivable aggregating \$341,000 were received during the month of September, constituted forty-four per cent of the total payments of that sort received, do you testify that

(Testimony of Allen R. LeRoy.)

that [617] was a healthy or unhealthy concentration in payments?

Mr. Lasky: If the Court please, what difference does it make with respect to the Bank of America whether in the month of September or October our bank's loaning operations with United Produce Company, our loaning technique was healthy or unhealthy? It gets back to the immateriality of these defenses. Sometime I want to present my argument on it. It seems to me so obvious. It has nothing to do with the case.

Mr. Erskine: It has a great deal to do with it, your Honor.

The Court: Counsel has a theory with reference to the matter.

Mr. Lasky: We could get into another lawsuit here, with all sorts of evidence as to whether we were a good bank or a bad bank, and the way we conducted loans. I would like to avoid getting into that kind of trial.

Mr. Erskine: I think you were a very bad bank in the way you conducted these loans, and I want to show it, and I want to show that when you wired the Bank of America on October 20th that United Produce Company was a sound account, and when you referred to that letter of September 22nd, which represented the United Produce Company was a very good account, that you did it without any justification or basis whatever, and I am going to show that.

(Testimony of Allen R. LeRoy.)

The Court: Then you will show that you acted in reliance upon that. [618]

Mr. Erskine: That is what we have already shown.

Mr. Lasky: The evidence shows they did not have reliance on it. If anything is clear, that is clear in this case.

Mr. Erskine: According to your contention that is clear, but according to my contention it is absolutely clear we did rely on it.

Mr. Lasky: Of course, the two contentions cannot be equally valid. I will submit that on its face on the record.

The Court: Proceed, counsel.

(The last question was read.)

A. It was an unhealthy concentration, I will admit, but entirely valid. It might have represented a series of entirely valid transactions. That is a question of credit department.

Q. (By Mr. Erskine): Was it reported to you by Mr. Tague and do you know about the concentration?

A. Mr. Tague was not asked in that report to give any information with respect to the accounts receivable. That came on a separate report.

Q. Wasn't Mr. Tague asked to make an investigation to determine the circumstances giving rise to the checks drawn by the United Produce Company to the order of Lofendo and checks of Lofendo drawn to the order of United Produce Company on

(Testimony of Allen R. LeRoy.)

both sides of this account? He was asked to investigate that, wasn't he?

A. Yes, but not both sides of the accounts receivable; they are two different parts. [619]

Q. And if Mr. Tague in investigating that situation had found out that the United Produce Company had this account with the checks on both sides and at the same time was receiving checks from Lofendo on account of accounts receivable aggregating about thirty-four per cent of the total of payments received during September, if he had found that out, you think that that should have alerted him to something wrong in this account?

Mr. Lasky: This call for this witness' conclusion as to whether he thinks somebody should have alerted somebody else.

Mr. Erskine: He is a banker.

The Court: Objection sustained.

Mr. Erskine: Now, it is half past five, your Honor. I have about come to another point.

The Court: Let us look at our situation again.

(Thereupon a discussion among the Court and counsel of respective parties ensued as to the profitable future lengths of the trial, after which an adjournment was set until tomorrow, Friday, June 23, 1950, at 10:00 a.m.) [620]

Friday, June 23, 1950, at 10 A.M.

The Clerk: Merchandise National Bank v. Bank of America on trial.

Mr. Lasky: If your Honor please, your Honor will recall that on Monday last I stated that we intended to make a motion to strike the answer of Mouradick to the third party complaint or, rather, to the interpleader counter-claim. I requested Mr. Erskine to notify Mr. Bianco to that effect. I understand Mr. Bianco has no intention of coming to Court.

Mr. Erskine: I telephoned to him yesterday, your Honor, and he said he did not feel able to come up here.

Mr. Lasky: Then since he is in legal contemplation in Court, since he was here at the opening of the trial, at this time on behalf of the plaintiff we move to strike out the pleading of Mr. Mouradick on the grounds that Mr. Mouradick has never served and never did serve any copy of that pleading upon the plaintiff, and therefore is not actually a party to this proceeding and therefore it should be stricken from the record.

Mr. Brandley: Your Honor, I would like to join in that motion on behalf of the trustee in bankruptcy of the United Produce Company, another interpleader defendant. I would like to say the record shows Mr. Mouradick was served with process on October 19, 1949, the summons giving him twenty days to [621] answer. His first appearance for pleading in the case was filed almost seven months later, on the 12th of May, 1950, and the records shows no stipulations for extensions of time to plead in the meantime. That pleading was never served on me, representing the trustee in bank-

ruptcy, and I do not believe it was served on Mr. Lasky.

Mr. Lasky: No, it never was. I never knew of Mr. Mouradick or his counsel until we came into Court.

Mr. Bradley: So we did not know of his pleading or who represented him until the eve of the trial. So far as the claim of the trustee in bankruptcy is concerned under the interpleader, the essential facts supporting that claim are admitted. They are alleged in the interpleader counter-claim and they are admitted by the replies thereto, both of the trustee and Merchandise National Bank. There would be no issue in this case as to those facts, except insofar as the reply of Mouradick denies them. Now, if the reply of Mouradick is allowed to stand, it will force the trustee to the trouble and expense at this late date of bringing witnesses and attempting to produce evidence to support their claims, which is admitted by all of the other parties. For that reason we would also join in the motion that this pleading be stricken.

The Court: Mr. Bianco represents——

Mr. Lasky: Mouradick, one of the interpleaders party defendants. [622]

The Court: Mr. Bianco is counsel for Mouradick.

Mr. Lasky: He has so appeared here, although his name has come into the record as counsel for the Bank of America at an earlier stage.

Mr. Erskine: Mr. Lasky has referred to that circumstance. There is nothing inconsistent in the fact



that Mr. Bianco represented the Bank of America in one situation and represents Mouradick in another, and levies a garnishment upon the Bank of America. I have represented the Bank of America for some time, and if I bring a suit against an individual and want to garnish the bank, I do not hesitate to do so.

The Court: Mr. Bianco has indicated to you he does not intend to appear?

Mr. Erskine: That is right, your Honor.

The Court: The motion is granted.

Mr. Bradley: Your Honor, in that case may I ask one more question? At some appropriate stage in the proceedings I would like to make a brief statement of the position of the trustee of bankruptcy in this action and ask permission to file a memorandum of law. I would assume the appropriate time to do that would be after all the closing arguments between the plaintiff and the defendant, if that is the way your Honor would like to have it.

The Court: Does counsel want to argue the matter orally or just submit it on your briefs at the conclusion of the [623] evidence?

Mr. Lasky: I, of course, will naturally defer to what the Court wishes. I think it might be very useful if we did have some oral argument shortly after the case is closed, while the evidence is fresh, and then the briefs can deal more with the law than with the facts. I think it would be helpful.

The Court: We will work that out as soon as we have time to do that.

Mr. Lasky: I will do whatever the Court thinks is most convenient.

The Court: We will work that out.

Mr. Bradley: Will it be proper to defer my statement on behalf of the trustee in bankruptcy until the arguments of other counsel have been concluded? My statement will be very brief, I might say.

The Court: I do not know that it is necessary to your position in the case. You are not in a position to argue the facts as they have been developed here.

Mr. Bradley: No, your Honor; that is correct. There is no issue of fact so far as we are concerned.

The Court: Your position depends upon what the decision is as between these two.

Mr. Bradley: That is true, but there may be an issue between Merchandise Bank and the trustee in case the judgment is granted for the Bank of America in the main case. Ordinarily, [624] of course, the Court would have to determine the issues between the two banks before the trustee would be required to put on his case.

The Court: Very well. You may make a statement at that time.

Mr. Lasky: Before counsel leaves, I understand that counsel for the trustee is prepared to stipulate to those summaries of the evidence of Mr. Gassman and Lofendo which I have prepared. He will accept them as the evidence of those witnesses. Correct, counsel?

Mr. Bradley: I have not seen the final preparation of that statement.

(After conferring with other counsel.)

Mr. Bradley: That is correct.

Mr. Lasky: It is final to the extent that I have not yet heard from Mr. Erskine on it. When I have heard from him it may have to be altered.

Mr. Erskine: I do not think so. I have not had a chance to fully study it.

Mr. Bradley: If it is altered, we will have another opportunity to check it.

The Court: Very well. Mr. LeRoy is on the stand.

ALLEN R. LeROY

recalled for defendant under Rule 43(b), previously sworn. [625]

Direct Examination

(Continued)

By Mr. Erskine:

Q. I have not very many questions, Mr. LeRoy, in addition to what I asked you yesterday. This may have been covered. I would like to ask you this. It is not unusual for a bank to pay checks of a depositor against uncollected funds in the depositor's account, is it?

A. Did you say was it usual or unusual?

Q. It is not unusual.

A. No, it is not unusual. It has been done in many cases.

Q. It was done in the case of the United Produce Company for some time prior to October 1st, by your bank, wasn't it?

A. Yes, I would say for some time, meaning, at

(Testimony of Allen R. LeRoy.)

least, thirty, forty days perhaps. I wouldn't want to go back of that.

Q. Therefore the thing that called your attention to the account was not only the fact that the United Produce Company was drawing against uncollected funds but also the fact that the checks were on both sides; that is right, isn't it?

A. Also the fact that they were depositing any checks in their commercial account, in view of the fact that we had the general assignment covering all of their accounts receivable.

Mr. Erskine: Will you read that last answer?

(Answer read by the reporter.)

Mr. Erskine: I do not quite understand that: the fact that they were depositing checks in their commercial account?

A. Well, we had a general assignment covering all of the accounts [626] receivable.

Q. Yes, that is right.

A. Consequently on large amounts it was a puzzle as to where they would derive funds outside of their accounts receivable or goods shipped on drafting operations.

Q. They could not get funds except from those two sources, could they, so far as the bank knew?

A. That is what I wanted to determine, where they were getting them. If they had gotten them from the accounts receivable, they should have gone into a remittance to pay the—remittance on the accounts receivable. If a draft were paid, it wouldn't, of course, come to the collection department of the bank.

(Testimony of Allen R. LeRoy.)

Q. What did you find out in that regard?

A. As Mr. Tague's memorandum shows, we found out that it was allegedly in payment of the pre-season advances.

Q. I see. Those funds were not coming to the bank as either payments on account of accounts receivable or on account of drafts, is that right?

A. That is right, sir. [627]

Q. As I understood you, you say that amounts mentioned in Tague's report were not coming in to the bank either under the general assignment of accounts receivable or on account of drafts discounted; that is right, isn't it?

A. That is correct.

Q. Did you discuss that circumstance with Mr. Rosenthal?

A. After Mr. Tague's report, yes, sir.

Q. What did you say to Mr. Rosenthal on that score?

A. Mr. Tague's report appeared to cover it, and I didn't bear down on that particular point. The point that the discussion was on, was that regardless of how the checks came, we wanted no disbursement on them prior to collections or adequate time at least to collect the checks.

Q. Then as I understand you, in your discussion with Mr. Rosenthal, you did not, to use your expression, bear down upon the fact that Tague's report showed that the United Produce Company was receiving sums that were not covered by the

(Testimony of Allen R. LeRoy.)

assignment of its accounts receivable or its drafts discounted, but what you did discuss with Mr. Rosenthal was the fact that you didn't want him to draw any longer on uncollected funds?

A. That was the point largely, because we accepted Mr. Tague's report.

Q. Tell me this, Mr. LeRoy, is Mr. Tague still working for your bank?

Mr. Lasky: Just a moment, please. I object to that as [628] utterly immaterial. Whether Mr. Tague is with us or not with us.

The Court: What is the materiality?

Mr. Erskine: I believe I can show that shortly after Mr. Tague gave his deposition in this matter he was discharged.

Mr. Lasky: If that was a fact, it would be irrelevant.

The Court: What bearing does that have upon the matter, counsel?

Mr. Erskine: Well, it shows that the bank, it seems to me, thought that he was negligent in the performance of his duties.

The Court: Oh, no, no, no. The objections is sustained.

Q. (By Mr. Erskine): I will put the same question to you about Mr. Reichwine, Mr. LeRoy.

Mr. Lasky: Same objection.

Mr. Erskine: Pardon me; let me get the question in.

Q. Is Mr. Reichwine still working for the bank?

The Court: For the same purpose?

(Testimony of Allen R. LeRoy.)

Mr. Erskine: The same purpose.

The Court: The objection is sustained.

Q. (By Mr. Erskine): And Mr. Redheffer?

Mr. Lasky: Same objection.

The Court: The objection is sustained.

Q. (By Mr. Erskine): I am quite sure that I asked you this, but it will only take one question to clear up the point, I [629] believe, and that is this: you didn't learn anything about the rejection by the Merchandise Bank of the \$97,000 in checks until the afternoon of November 19, is that right?

A. That is correct.

Q. When you were told by Mr. Messenger?

A. Correct.

Q. When you came out here to California you had a list of the Lofendo checks which had been received by the Merchandise Bank the location of which you wanted to determine; that is correct, is it not?

A. Yes, sir, Lofendo and other checks, too—other items.

Q. Mainly Lofendo checks though, were they not?      A. Yes, sir.

Q. And Lofendo checks in excess of \$500,000?

A. As I remember it the whole items were in excess of \$500,000, yes, sir.

Q. The bulk of it was Lofendo checks?

A. I would say so.

Q. And as I understood your testimony the other day, you weren't sure how your bank had come



(Testimony of Allen R. LeRoy.)

into possession of those checks, whether they had been deposited by the United Produce to the credit of its commerical account, or whether they had been received from United Produce with remittance sheets as payments on account of assigned accounts receivable?

Mr. Lasky: That question relates to what he knew at the [630] time he came to San Francisco?

Mr. Erskine: That is right.

A. At that time I didn't know where the items originated, what the source was with us.

Q. (By Mr. Erskine): Did you know at that time whether or not the United Produce Company had ceased to draw against uncollected funds with your bank?

A. I knew that they had ceased on the 17th.

Q. Did you know whether after they had ceased on the 17th they continued to draw against uncollected funds until the 17th of November?

A. Well, counsel, I said they ceased on the 17th because they ceased operations—the 17th of November, because they ceased operations on that day.

Q. I see. I thought you referred to the 17th or 18th of October; pardon me. Do you know whether after October 18th the United Produce Company ceased to draw against uncollected funds?

A. My impression is that it did not in entirety.

Q. But to a large extent?

A. Until about the 1st of November.

Q. And then about the 1st of November they

(Testimony of Allen R. LeRoy.)

ceased to draw against uncollected funds, is that right?

A. That is my impression. I wouldn't want to state that without looking it up.

Q. Did you know that when you came out here to California? [631]

A. Know what? The day it ceased to draw——

Q. Yes.

A. ——or had not ceased to draw against uncollected funds?

Q. That's right.

A. That they had not ceased to draw?

Q. Did you know whether or not they had ceased to draw against uncollected funds?

A. I was advised that they had ceased to draw, but I didn't look it up myself.

Q. If you knew that, Mr. LeRoy, if you were told that, didn't you also know, or didn't you believe that the time that you came out to California that the checks, the Lofendo checks, the whereabouts of which you wanted to determine, had been delivered to the bank on account of accounts receivable?

A. I didn't try to make any construction of the source of them at that time.

Mr. Erskine: I see. I think that is all, your Honor.

Mr. Lasky: No questions.

The Court: Very well. You may step down.

Mr. Erskine: I will call Mr. Johnson.

KENNETH M. JOHNSON

called on behalf of the defendant, sworn.

The Clerk: Will you state your name to the Court.

A. Kenneth M. Johnson. [632]

Direct Examination

By Mr. Erskine:

Q. Mr. Johnson, what is your occupation?

A. I am an attorney on the legal staff of the Bank of America.

Q. Have you got a title?

A. I have the title of assistant counsel.

Q. Assistant counsel. Does that make you an officer of the bank?      A. No.

Q. How long have you occupied that position, Mr. Johnson.      A. Approximately——

Mr. Lasky: Just a moment, please. I think that the last question called for the witness' conclusion.

The Court: Yes, it did.

Mr. Lasky: I move to strike out the answer for that reason and object to the question.

The Court: Very well, the answer may be stricken. The objection is sustained to the question as to whether or not his work makes him an officer of the bank.

Q. (By Mr. Erskine): How long have you been an assistant counsel for the Bank of America?

A. Approximately 10 years.

Q. Approximately 10. How long have you been practicing law, Mr. Johnson?

(Testimony of Kenneth M. Johnson.)

A. Approximately 24 years.

Q. Do you recall having a conversation with Mr. Roland Duncan and Mr. LeRoy who was just on the witness stand and yourself [633] on November 18th?

A. Yes, I do.

Q. Where did that conversation take place?

A. That took place in my office at 300 Montgomery Street.

Q. Before I come to that, Mr. Johnson, in view of the representation that I made to the Court the other day, you have not been well recently, have you?

A. No, I have not. As a matter of fact, this is the first day that I have left my home after being in the hospital.

Q. You have been sick about a month, is that right?

A. That is correct.

Q. Getting back to this conversation, did you say that it took place in your office in the Bank of America?

A. That is correct.

Q. And about what time on November 18th?

A. In the afternoon.

Q. About what time in the afternoon? Can you fix the time approximately?

A. I would say approximately 2:30.

Q. Tell us what was said in that conversation, Mr. Johnson, between you, Mr. Duncan and Mr. LeRoy.

A. Well, the conversation can be broken down into two different sections. During the——

(Testimony of Kenneth M. Johnson.)

Q. I take it that first of all, Mr. Duncan introduced Mr. LeRoy to you, did he? [634]

A. That is correct.

Q. What did he say?

A. Mr. LeRoy had already had some conversation with Mr. Duncan, and Mr. Duncan came in and he introduced Mr. LeRoy to me, indicating the bank he was connected with, and stated that he had certain problems, or that certain problems had arisen.

The first portion of the conversation dealt with whether or not it was necessary to go through with formal presentation and protest with relation to certain checks. I think the conclusion was reached, probably suggested by myself, that the holder of those checks could waive both presentation and protest. That took a minute or two to discuss. We passed on to the subject matter principally of our conversation.

Q. Now would you pause there for a minute, Mr. Johnson, so that we get that clear. There was a discussion with respect to the waiver of presentation and protest of certain checks, was there?

A. That is correct.

Q. Was it explained to you what checks that discussion referred to in a general way?

A. Well, very probably in a very, very general way. My recollection now is that I knew that the Merchandise Bank and the Bank of America were concerned. It came to me as more or less an academic problem at that time. It was only discussed

(Testimony of Kenneth M. Johnson.)

for a moment or two. I have no detailed recollection as to it.

Q. You gave your opinion on that point, did you? [635]           A. That is correct.

Q. And I think you have stated that what you told them was your opinion, is that right?

A. That is correct.

Q. Then the discussion went on to another subject. Tell us what the matters discussed were.

A. Well, between Mr. LeRoy and Mr. Duncan, they familiarized me with a situation about as follows: They stated that approximately \$113,000 worth of checks had been presented originally at the East Bakersfield branch of the Bank of America; that these checks——

Q. Had been presented or deposited there?

A. Well, they used the word “presented”; they came from the holder; they were delivered there. And sent by the East Bakersfield branch of the Bank of America to the Merchandise National Bank of Chicago, which was the drawee bank.

Mr. LeRoy, possibly amplified in some detail again by Mr. Duncan, told me that those checks had not been paid; that regardless of that that a clerk had picked up an advice of credit in error and that advice had been mailed to the Bank of America.

To summarize the conversation, one of the principle purposes of Mr. LeRoy’s visit——

Q. (By Mr. Erskine): Is this what he said? Is this what Mr. LeRoy said? [636]

(Testimony of Kenneth M. Johnson.)

A. No, this isn't what Mr. LeRoy said; I am still summarizing the conversation.

Mr. Lasky: Well, if it is the witness' conclusions about it, I would object to it.

The Court: Yes. Don't summarize it; just recite the conversation.

A. Well, after stating the facts, that I have already indicated Mr. LeRoy made a request that the Bank of America disregard the advice of credit when it should be received by the bank. There followed then a discussion between Mr. LeRoy and myself of the various legal aspects of the situation. Mr. LeRoy took the position that he, having arrived——

Q. (By Mr. Erskine): Is this what he said?

A. What he said. Then he having arrived in person prior to receipt of the credit, that the Bank of America was bound to obey his request that the Bank of America disregard the advice of credit. At that time I was concerned with the——

Mr. Lasky: Now I am going——

The Witness: No.

Mr. Lasky: I am going to object to what he was concerned with.

Q. (By Mr. Erskine): Is this what you told him?

A. Yes; I pointed out to Mr. LeRoy that his institution was not the only one concerned; that the depositor at East Bakersfield who had delivered these checks to the bank had [637] certain rights in the premises. [638]



(Testimony of Kenneth M. Johnson.)

Q. Go ahead. What else, what was said in that connection, in this discussion of the legal positions of the parties?

A. I did tell Mr. LeRoy and also Mr. Duncan that without making an effort to determine the ultimate legal rights and duties, that we were anxious to assist Mr. LeRoy and the Merchandise National Bank in any way which would not cause injury or loss to the Bank of America, and that I would do everything that I possibly could to that end.

Immediately after that I placed a call for Mr. Estribou of the East Bakersfield Branch. I outlined to Mr. Estribou very roughly and briefly the information made known to me by Mr. LeRoy, I asked Mr. Estribou what was the situation in relation to the Lofendo account. Mr. Estribou, I should say, as Manager of the East Bakersfield Branch of the Bank of America, told me that there was a credit balance in the Lofendo account and that he had not advanced specifically to Mr. Lofendo against the \$113,000 worth of checks that was the subject of conversation.

On the basis of the information that I had at that time received from Mr. LeRoy—

Mr. Lasky: Just a moment. It is obvious the witness is starting off on something that he did not say. He said the basis of something.

Q. (By Mr. Erskine): Is this what you told Estribou?           A. Yes.

Q. Go ahead. [639]

(Testimony of Kenneth M. Johnson.)

A. I told Mr. Estribou that on the basis of the information which I had received from Mr. LeRoy and also on the basis of the information that Mr. Estribou had given me, that he should ignore the advice of credit when he received it

Q. What did Mr. Estribou say to that?

A. Mr. Estribou remonstrated with me over the telephone. He appeared reluctant——

Q. Did he say——

A. He was reluctant.

Mr. Lasky: I move to strike out the statement that he was reluctant and that he remonstrated.

The Court: Yes. Do not characterize what he said; just tell us what he said.

Q. (By Mr. Erskine): That is right. Just tell us what he said, Mr. Johnson.

A. Mr. Estribou told me that he doubted that he would be permitted to ignore the advice of credit when it arrived. Further, that if he was to ignore it, he would desire a letter in writing from some official of the Bank of America at San Francisco. I told him again orally to ignore the advice of credit when it arrived. I told him also that I would have a letter sent to him as he had requested to the same effect.

Q. Was there anything said as to how long he should continue to ignore the advice of the credit?

Mr. Lasky: Now, that is a leading question and a suggestive [640] question to his own witness.

The Court: Yes. It is a peculiar question: How long to ignore a matter. Do you mean you could

(Testimony of Kenneth M. Johnson.)

ignore it and then not ignore? Is that the theory?

Mr. Erskine: I do not want to state the theory because that would be suggestive, your Honor.

The Court: The question is leading. He is your witness. The objection is sustained.

Q. (By Mr. Erskine): Can you tell us anything else that was said in that conversation between Estribou and yourself, Mr. Johnson?

A. Well, the conversation was relatively brief. I told him to ignore the advice of credit. I also told him to freeze the account and not permit any transactions of any kind or charges on the part of anybody. Mr. Estribou again requested written confirmation. I feel quite certain that I warned him again that there should be no further transactions, and that terminated the conversation.

Q. When you and Mr. LeRoy were discussing the legal aspects of the situation, was there anything said in addition to what you have already said with respect to the position of Lofendo in the matter?

A. Pardon me. You say Lofendo was the name?

Q. Yes. Lofendo was the depositor.

A. As I have already stated, I have indicated to Mr. LeRoy I [641] had concern for possible claims by our depositor. Mr. LeRoy was quite definite in his statements to me that we need have no fear in that connection, that Lofendo was a participant in a fraud.

Q. Have you related about all that was said in that conversation between you, Mr. Duncan and Mr.

(Testimony of Kenneth M. Johnson.)

LeRoy now, Mr. Johnson?

A. I think that is just about all. I think the statements that I have indicated on behalf of the participants and their conversation fairly indicate its nature and substance.

Q. That is all right. You have stated all that you could recall. After that took place, what happened? Did Duncan and LeRoy leave?

A. I requested Mr. Duncan, who was an officer of the bank, to write a letter to Mr. Estribou, Manager of the East Bakersfield Branch, requesting or, directing him to ignore this credit when it should arrive. At that point Mr. Duncan and Mr. LeRoy left my office together.

Q. Did you see them later in the afternoon?

A. I did.

Q. Shortly thereafter?

A. Well, I would say it was at least an hour, possibly longer. It would be in the later part of the afternoon.

Q. Were they together when they came into the office?

A. They were together. At that time they brought with them a letter which had presumably been prepared by Mr. Duncan and [642] directed to Mr. Estribou. That letter was exhibited to me. I was asked if I approved its transmission. I said that I did. My recollection of it is that there was a second memorandum dealing with other matters, that either Mr. Duncan or Mr. LeRoy had prepared,

(Testimony of Kenneth M. Johnson.)

which was exhibited to me at that time, but with which I was not directly concerned.

Q. The second letter you have mentioned, I take it, Mr. Johnson?

A. Yes, this is the second letter which I mentioned.

Q. And the other letter to Estribou was this, was it, Mr. Johnson, as you recall Plaintiff's Exhibit 11, dated November 18th, 1948?

A. That is the first letter to which I have just referred.

Q. Mr. Johnson, did you or did you not in that conversation with Mr. LeRoy say anything to the effect that you believed that Merchandise National Bank was within its rights in revoking the advice of credit?

Mr. Lasky: If the Court please, your Honor, that is a leading question. The witness has been asked to relate the conversation and have related it.

The Court: Oh, yes, but I do not think we have to worry about that.

Mr. Erskine: I think I have a right to rebut the testimony of Mr. LeRoy by direct questions of that sort.

The Court: Yes, proceed. The objection is overruled. [643]

A. I think that I did say that it might well be that Mr. LeRoy was correct in his contentions. However, I was not trying to act as a judge at that time.

(Testimony of Kenneth M. Johnson.)

Mr. Erskine: I think you stated previously that you told him that you were not going to make a final decision with respect to the legal rights of the parties?

Mr. Lasky: That certainly is a leading question.

The Court: Yes, surely. The objection is sustained.

Q. (By Mr. Erskine): Did you tell Mr. LeRoy that in your opinion if the Bank of America entered this credit, it would do so at its own risk?

A. I think that is in substance similar to the question I just answered: Mr. LeRoy told me that, and I believe I said it might well be true. However, I did tell him that regardless of what the ultimate legal rights were, to the extent that the Bank of America was not injured and would not suffer, and regardless of the legal rights, the technical legal rights of the parties, we would do everything that we could to assist him and his institution.

Mr. Erskine: That is all.

### Cross-Examination

By Mr. Lasky:

Q. Mr. Johnson, just a question or two. A few moments ago, you said in your telephone conversation with Estribou, you said something about freezing an account. The account you [644] referred to was the account of Lofendo at East Bakersfield?

A. That is correct.

Q. When you told Mr. Duncan to write a letter to Mr. Estribou giving him instructions to ignore

(Testimony of Kenneth M. Johnson.)

the advice of credit when it arrived, you did not tell Mr. Duncan to put in any clauses saying if, or, provided the Bank of America is not hurt, did you?

A. No.

Q. And when you saw the letter which was later shown to you by Mr. Duncan, before it was sent out, you observed, did you not, that it had no such if or buts in it? A. That is correct.

Q. You approved the letter anyway?

A. That is right.

Mr. Lasky: That is all.

### Redirect Examination

By Mr. Erskine:

Q. Mr. Johnson with respect to what counsel was just asking you, that is, the subject of the grounds upon which you approved that letter, will you state why you approved the letter in the form which you did approve it?

Mr. Lasky: I think what went on in his mind and which was not expressed in any statement is immaterial and I object on that grounds.

Mr. Erskine: I think if he is asked why he approved the letter his attention is called to the fact he has approved this [645] letter, he has the right to state the reason for his approval.

The Court: He was not asked why. He was asked if he did approve it without condition.

Mr. Erskine: I think that is all. No further questions. I would like to call Mr. Messenger.



FREDERICK C. MESSENGER

was called as a witness on behalf of the Defendant, and being first duly sworn testified as follows:

Mr. Erskine: I would like to state that I am calling Mr. Messenger, as I also called Mr. LeRoy, under Rule 43 (B).

The Court: You are calling him under Rule 43 (B).

Direct Examination

By Mr. Erskine:

Q. Mr. Messenger, you had a telephone conversation with Mr. LeRoy on November 18th, did you not? A. I did.

Q. That conversation with Mr. LeRoy took place late in the afternoon of that day?

A. Yes, it did.

Q. Somewhere around five o'clock, Chicago time?

A. I do not know exactly what time it was but it was in that approximation.

Q. Somewhere between four and five o'clock, we will say, is that right?

A. Someplace around in there. [646]

Q. Did you put in the call or did Mr. LeRoy call you? A. Mr. LeRoy called me.

Q. Is it also true, is it not, Mr. Messenger, that early in the afternoon of that same day, November 18th, an employee of the Merchandise Bank advised you that there were being presented to the Merchandise Bank for payment checks drawn by the

(Testimony of Frederick C. Messenger.)

United Produce Company to the order of Lofendo amounting to about \$97,000?

A. There were a number of checks presented to me on that day. I do not recall whether there were just checks payable to Lofendo or whether there were others besides, because we were having quite a number of items coming in. But there were items which were payable to Lofendo in that group presented.

Mr. Erskine: At this time, if the Court please, in order to get those checks I would like to have an order directing that the deposition of Mr. Frederick B. Stocker be opened. The deposition I am quite sure is on file here.

The Court: The checks are attached to the deposition?

Mr. Erskine: That is my understanding, either the checks or photostatic copies of them.

Mr. Lasky: Counsel, I do not see any reason why we cannot stipulate very clearly as to any detail you want about these checks, when they were presented to Continental, when Continental got them, when Continental presented them to Merchandise, and when Merchandise rejected them. That is all clock work. [647]

The Court: Can't you stipulate to that, counsel?

Mr. Erskine: Oh yes. I think counsel is right. We will stipulate them now, Mr. Lasky.

Mr. Lasky: I can assure you I have not even read Stocker's deposition but whatever you tell me about the time will be all right.

(Testimony of Frederick C. Messenger.)

Mr. Erskine: Five checks aggregating \$97,270, I believe, subject to correction, were these checks of the United Produce Company.

Mr. Lasky: It is \$97,207.50.

Mr. Erskine: \$207?

Mr. Lasky: Yes.

Mr. Erskine: Five checks aggregating \$97,207.50 drawn by the United Produce Company to the order of Frank C. Lofendo were presented through the Chicago clearing house by the Continental Illinois National Bank to the Merchandise National Bank on the morning of November 18th, 1948, that those checks were then delivered to Merchandise National Bank as part of the clearing operation that started at the Merchandise National Bank on the morning of that day, that the checks were then presented by an employee of the Merchandise National Bank to Mr. Messenger, and for Mr. Messenger's instructions as to whether or not the checks should be paid or rejected; that Mr. Messenger then directed the checks to be rejected, and at 1:30 on the afternoon of November 18th, Chicago time, the [648] Merchandise Bank, pursuant to the practice of banks in Chicago, telephoned the presenting bank, the Continental Illinois Trust Company, that it was rejecting the checks. That thereafter the Merchandise Bank, following that practice, actually delivered the checks to the Continental Illinois Bank on the following day, and that the day after the checks in ordinary course were returned by the Continental to the Bank of America.

(Testimony of Frederick C. Messenger.)

Mr. Lasky: I will stipulate to those facts with this understanding: That when you said pursuant to the practice of Chicago banks, you are relating to the fact that is existing in the case of items coming through the clearing house.

Mr. Erskine: That is right.

Mr. Lasky: I will stipulate to the facts but I object to the materiality of them.

The Court: Yes. It shows under your——

Mr. Lasky: This is more particular because I do not see how this has any bearing on the two counter claims and affirmative defenses. It is just an isolated fact, so far as I can see it.

Mr. Erskine: It is a fact, that I intended to prove that what Mr. Messenger said under direct examination and was excluded upon the ground that my questions relating to it were not proper cross-examination.

Q. Now, at the time you gave your instructions to return the checks, you knew, did you not, that they had been received by the Continental Bank on the day previous, that is, on November [649] 17th?

Mr. Lasky: If the Court please, I object to this as immaterial. What difference does it make?

Mr. Erskine: I will tell you what the purpose of it is, your Honor. The purpose of it is this: All of this line of questioning—the one that I hope to indulge in—is intended for this purpose: Our contention is that Mr. LeRoy came to the Bank of America on November 18th and told our officers

(Testimony of Frederick C. Messenger.)

and employees there—Mr. Duncan and Mr. Johnson, we will say—that the advice of credit had been sent out in error and that it was either revoked or that he wanted it revoked, depending upon which version is accepted, and they discussed at that time the question of whether or not the advice of credit should be revoked, and that at the time our people told Mr. LeRoy that they were willing to revoke the credit. They thought he might have a right to revoke and they were willing to help out to revoke the credit if our bank was not hurt. If that then Mr. LeRoy prepared his letter of November 18th and delivered it to Mr. Duncan, and that time Mr. LeRoy called up Mr. Messenger from the office of Mr. Duncan in the Bank of America to tell Mr. Messenger what had taken place in the process of advice of credit. At that time Mr. Messenger knew that the \$97,000 in checks had been rejected, and at that time knew or should certainly have had good grounds for believing that the Bank of America had paid the checks against \$97,000, but he did not see fit to tell Mr. LeRoy that, about those circumstances. So that Mr. LeRoy could [650] communicate those circumstances to the officers with whom he was dealing in the Bank of America. That is the purpose of this line of questions and I think it is entirely proper.

Mr. Lasky: I only want to take a moment. We have two different events with respect to a set of six checks for \$113,000. We have the fact that they

(Testimony of Frederick C. Messenger.)

were revoked. All the evidence agrees that at least there was a unilateral revocation. There is no dispute on that. Revoked, and the Bank of America knew about it long before they entered any credit on it, acted in any reliance upon it, paid out a single penny in reliance upon it seems to be their position.

Now, we have five other checks coming through on a different day which were presented to Chicago and rejected for lack of funds. What is the connection between the two? What difference does it make that on November 19th or late in the afternoon of the 18th, after all the other events have transpired, after Mr. LeRoy was through talking in San Francisco, Mr. Messenger knew then that his bank had rejected some checks because there were no funds? I see no connection. I submit there is none.

The Court: I do not see the connection there, counsel. I understand, of course, you have authority for your position, and I have not studied the law on the matter but I fail now to see the connection, but I am going to let it come in under the same reserved ruling, and permit you to go ahead, but I advise you, so you will understand, that I do not understand your [651] position. You can explain it to me with authority later. [651-A]

Mr. Erskine: I personally do not believe it needs authority; I think it is clear upon the face of it.

The Court: If it doesn't need any authority, I can rule on this right now. If you feel that way, I



(Testimony of Frederick C. Messenger.)

can rule upon this matter right now. If it is just based upon some reasoning without some authority to sustain you, I can rule upon it right now if you want me to.

Mr. Erskine: Well, I don't want you to.

The Court: Very well.

Mr. Erskine: I will be candid with you in saying that I haven't got any authority to directly support this question.

The Court: All right; let's go ahead, and I will let you put it in so that upon argument and explanation to me, I may see your point and follow it.

Mr. Lasky: Then I won't be repeating the objections; I will just make the general objection.

The Court: The same thing; it is going in under the reserved ruling.

Mr. Erskine: What was the last question?

(The reporter read the last question.)

A. It would be a natural assumption that the Continental had received them on the 17th.

Q. And you knew too, did you not, or you believed at the time you rejected the checks, that as the Continental had received them on the 17th and as they came from California, that they [652] had left California prior to the 17th? You believed that too?

Mr. Lasky: The witness is being asked for certain assumptions he may had made.

Mr. Erskine: I am trying to determine his state



(Testimony of Frederick C. Messenger.)

of mind, if the Court please, about those six checks. I think it is proper cross-examination.

The Court: I think that you will get it in eventually, so let's speed it up and do it the way you are doing. Go ahead.

A. It would only be natural to assume that they had left California before the 17th.

Q. (By Mr. Erskine): And you knew that at the time, you naturally had that in mind at the time you rejected the checks?

A. That is correct.

Q. In your telephone conversation with Estribou on November 17th, Estribou told you, as I remember your testimony, that the balance to the credit of the Lofendo account at the time he was talking with you was \$699?

A. That is correct.

Q. A stipulation has been filed in this matter with respect to the difference between a cash letter and a collection letter, Mr. Messenger, and so I do not propose to examine you at any length with respect to that matter, but I will ask you this: When these checks were presented to you, when they arrived at your desk through clearings from the Continental—— [653]

Mr. Lasky: You mean the five checks?

Mr. Erskine: The five checks aggregating \$97,207 arrived at your bank in the morning or during the day of November 18th, you knew that the Continental had received those checks with a cash letter from the Bank of America?

(Testimony of Frederick C. Messenger.)

A. I had no knowledge how the Continental had received them.

Q. It is ordinarily the case, isn't it, in the practice in Chicago that when checks are presented through the clearing house there, that the presenting bank—that is, out of town checks are presented through the clearing house to the drawee bank that the presenting bank has received them from out of town with a cash letter; that is the ordinary practice, isn't it?

A. That is an ordinary practice, but not one that is always absolute.

Q. Are checks presented through the clearings by any presenting bank, out of town checks, that have not been received in what is commonly known as a cash letter?

A. I have known them to be, yes, sir.

Q. But ordinarily checks are presented, checks presented through the clearings, out of town checks have been received by the presenting bank with a cash letter?

A. That is normally the procedure.

Q. When those five checks were called to your attention there in the early part of the afternoon of November the 18th, did you believe at that time that the Bank of America had paid [654] checks against that \$97,000?

A. I didn't give any consideration to that at all; all I did was reject the items.

Q. At that time, Mr. Messenger, you knew that Mr. LeRoy was in California?

A. Yes, I did.

(Testimony of Frederick C. Messenger.)

Q. And you knew that he had gone to California to discuss with the Bank of America the rejection of the advice of credit sent out with respect to the six checks?

A. As one of the matters that he was to cover.

Q. You talked to Mr. Estribou the day before, and Mr. Estribou had told you that the balance to the account of Lofendo was \$699?

A. That is correct.

Q. And you knew that these checks for \$97,000 had been sent by the East Bakersfield branch at least a day or so prior to November 17th; that is, sent by it to the Continental Illinois Bank? You knew that at the time, didn't you too?

A. I didn't just exactly get your question the way you put it, Mr. Erskine.

Q. What was it?

A. I didn't get your question.

Mr. Erskine: Read the question, Mr. Reporter.

(Question read by the reporter.)

Mr. Lasky: Can't we assume that the witness assumed if [655] something came through the mail from California it took some days?

The Court: Counsel may proceed.

A. Yes, that's right.

Q. (By Mr. Erskine): So you knew that, as the balance was \$699 on November 17th when you were talking with Estribou, and that if the Bank of America had paid checks against that \$97,000, the rejection of the checks by you would cause an overdraft in this account?

(Testimony of Frederick C. Messenger.)

A. I didn't look——

Mr. Lasky: I object to that as a hypothetical question; if he knew that the Bank of America had already paid it, this would cause an overdraft. That isn't asking what he thought or had in his mind; it is asking now if he made some conclusions upon certain assumptions, what conclusions would he have come to. It is all utterly foreign to the case.

Mr. Erskine: The purpose of the question is this, your Honor: that the witness has said when he rejected those \$97,000 in checks he didn't give any thought to what effect it would have upon the balance to the credit of Lofendo in the East Bakersfield branch and what relationship it would bear to the errand of Mr. LeRoy to secure a return of the advice of credit. I want to show that under the circumstances those facts must have been in his mind, he couldn't have escaped them. [656]

The Court: You can ask him, of course, if he did give consideration to certain conditions that existed.

Mr. Erskine: That is probably a better way.

The Court: Whether or not he must have had them in his mind then is a matter for you to argue.

Mr. Erskine: Yes.

Mr. Lasky: The particular question was that if he did know——

The Court: If he did know it, didn't an overdraft result?

Mr. Lasky: Yes.

(Testimony of Frederick C. Messenger.)

The Court: The objection is sustained.

Mr. Erskine: I will put it in the way the Court suggested. I shouldn't say that, but I will put it this way:

Q. When you rejected the checks for the \$97,000, did you have in mind that Estribou had told you on the previous day that the balance to the account of Lofendo was \$699?

A. I had no thoughts about the matter at all.

Q. You didn't consider that at all?

A. No; there were checks that were drawn against Merchandise National Bank and we were not paying any checks against the account, and this \$97,000 and other checks were referred to me for decision. I rejected them all.

Q. Did you notice that this \$97,000 in checks were drawn by the United Produce Company to the order of Lofendo? Did you notice that? [657]

A. I noticed that there were some checks drawn to the order of Lofendo.

Q. And that fact, that those particular checks were drawn to the order of Lofendo, did come to your attention, is that right?

A. There were some checks that were payable to Lofendo, and I noticed that.

Q. Mr. Messenger, did you also have in mind at the time you rejected those particular checks, the checks drawn by the United Produce Company to the order of Lofendo, that the Bank of America may have paid checks of Lofendo against the \$97,000?

(Testimony of Frederick C. Messenger.)

A. No, sir, I didn't have that in my mind.

Q. You had in mind, did you not, Mr. Messenger, that the checks were being presented through the clearings? That is right?

A. I knew that.

Q. And you had in mind that the normal practice — normally, usually checks presented to the clearings were received as cash items by the presenting bank?

A. I wasn't thinking anything about them; I was having certain checks presented to me for a decision, and I made the decision to reject them.

Q. You didn't consider at all then the fact that those checks, the \$97,000 in checks, were cash items, and that consequently—— [658]

A. I knew they were cash items; they were presented to us from the Continental. We had to——

Q. Through the clearings?

A. Through the clearings. We had to reject them or pay them, and I gave instructions to reject them.

Q. If you knew that they were cash items, that they were checks drawn by the United Produce Company to the order of Lofendo, you had in mind at the time you rejected them, did you not, Mr. Messenger, that the Bank of America had paid checks against them and had given immediate credit for the checks?

A. I had no idea in my mind whatsoever.

Q. It didn't occur to you?

(Testimony of Frederick C. Messenger.)

A. I didn't think about it.

Q. You did testify, did you not, Mr. Messenger, that in your conversation with Mr. Estribou, Mr. Estribou told you that so far as the records of his branch were concerned, there were two collection items outstanding aggregating \$165,000, one for \$113,000 and one for \$52,000; you did testify to that, didn't you? A. Yes, I did.

Q. In that conversation that you had with Mr. Estribou on November 18th, I mean on November 17th, Mr. Estribou didn't tell you that he also had outstanding a collection item for [659] \$97,207, did he? A. No, sir.

Q. Did you have in mind when you rejected those five checks aggregating \$97,207 that that was one of the items—that that item, rather, was not mentioned as one of the items according to Mr. Estribou in your conversation with him on the previous day, was still outstanding from the East Bakersfield branch as a collection?

A. I wouldn't have known that; and I couldn't have been able to tell, because I only had the collection records of our own bank in front of me when you spoke about collections.

Q. Mr. Estribou told you that there were two collection items outstanding, one for \$113,000 and one for \$52,000, aggregating \$165,000; that is correct, isn't it? A. That is correct.

Q. Isn't it? A. That is right.

Q. And he did not tell you that there was a third collection item outstanding for \$97,007?



(Testimony of Frederick C. Messenger.)

A. No, he didn't tell me.

Q. So did you have in mind on November 18th, Mr. Messenger, when you rejected those five checks, that the Bank of America had given immediate credit for those checks to Lofendo?

A. I didn't have anything in my mind insofar as what the Bank of America was doing or had done with reference to these checks. [660]

Q. But you did see the checks, didn't you, when you rejected them? A. Yes, I did.

Q. And you did see that those were checks drawn by the United Produce Company to the order of Lofendo; that is correct, isn't it?

A. Sure.

Q. And you did know at that time that the bank that was handling checks drawn by the United Produce Company to the order of Lofendo was the East Bakersfield branch of the Bank of America? You did know that too, didn't you?

A. I knew that there was checks coming through right in front of me with the East Bakersfield endorsement bearing Lofendo's name, yes.

The Court: I think we might take a short recess at this point. The Court will stand in recess until 20 minutes after eleven. [661]

Q. At any rate, Mr. Messenger, when you talked to LeRoy on the afternoon of November 18th, did Mr. LeRoy discuss with you the revocation of the advice of credit for the six checks?

A. Yes, he did.

Q. At that time did you tell Mr. LeRoy that

(Testimony of Frederick C. Messenger.)

a few hours previously you had rejected checks drawn by United Produce Company to the order of Lofendo for \$97,000.      A. No, I did not.

Q. Didn't it occur to you, Mr. Messenger, at that time that that was a fact in which Mr. LeRoy might be interested in discussing the situation with the officer of the Bank of America in San Francisco?      A. No, it did.

Q. You recall, Mr. Messenger, on the morning of November 15th the Merchandise Bank received a wire from the Bank of America to the effect that three checks had been rejected by the Bank of America?      A. Yes, I do.

Q. And you recall that those checks arrived at the Merchandise Bank, the checks that had been rejected, on November 17th?      A. Yes, I do.

Q. On November 15th or 16th, do you know whether the Merchandise Bank or any officers of the Merchandise Bank had any conversation with the officers of the United Produce Company with respect to the three checks that had been [662] rejected?      A. On November 15th or the 16th?

Q. Yes.      A. I do not know.

Q. You do recall that there was a discussion with the officers of the United Produce Company on November 17th?      A. Yes, I do.

Q. You recall, too, do you not, Mr. Messenger, that on November 17th the Merchandise bank received another wire from the Bank of America to the effect that additional checks of \$109,000, I believe it was, drawn by Lofendo to the order of

(Testimony of Frederick C. Messenger.)

the United Produce Company, had been rejected?

A. I knew that there was another wire that came in on the 17th listing some checks that were rejected by the Bank of America, yes. As to the amount, I did not make a computation of them at that time. They were listed individually, as I recall.

Q. And it was on November 17th that Rosenthal was called in and disclosed the fact that he had been carrying on transactions which might cause the Merchandise Bank a severe loss?

A. That is correct.

Mr. Erskine: I will ask you, Mr. Lasky, if you have the original telegram dated November 17th, 1948, sent by the Bank of America to the Merchandise National Bank.

Mr. Lasky: Can you give me the exhibit number?

Mr. Erskine: I do not believe this was introduced in evidence. [663]

Mr. Lasky: If it was not, I am not sure I could help you.

Mr. Erskine: It is not very important. I will ask the witness if he remembers the wire and remembers this is a copy of the wire.

(The document referred to was thereupon marked Defendant's Exhibit U for identification.)

Mr. Erskine: You stated, Mr. Messenger, as I understood you, that a wire was received by the

(Testimony of Frederick C. Messenger.)

Merchandise Bank on November 18th notifying it that additional checks were being rejected by the Bank of America, that is, checks drawn by Lofendo to the order of the United Produce Company. I will ask you if this paper, Defendant Exhibit U, is a copy of the wire to which you referred?

A. I think you stated received on November 18th.

Q. Oh, I meant November 17th. Pardon me.

A. We received a wire upon November 17th, and, as I recall it, the information contained in this copy here is apparently what was in the original.

Mr. Erskine: I would like to ask that that go in evidence.

The Court: Any objections to this copy going in?

Mr. Lasky: No, no objection. I do not see any relevance.

(The document referred to was thereupon received in evidence and marked Defendant Exhibit U.)

Mr. Erskine: Mr. Lasky, on page 48 of Mr. Messenger's deposition there is a reference to a defendant exhibit 6. [664] As I understand it, that was a permanent record kept by the Merchandise National Bank relating to the advice of credit respecting the three checks. I would like to have it.

Mr. Lasky: You say it is No. 6?

Mr. Erskine: No. 6, yes.

(Testimony of Frederick C. Messenger.)

Mr. Lasky: I will see if I can get it. This is it.

Mr. Erskine: I will ask that this be marked.

(The document referred to was thereupon marked Defendant's Exhibit V for identification.)

Mr. Erskine: I will show you this document, Mr. Messenger, which has just been marked V for identification, and ask you whether or not that is not the permanent record——

Mr. Lasky: We can stipulate as to that.

Mr. Erskine: This is the permanent record.

Mr. Lasky: This is the bank's permanent copy of that collection matter.

Mr. Erskine: That is all six checks.

Mr. Lasky: The six checks, the \$113,000, yes. If you want a further stipulation, the handwriting on it, other than the exhibit number, which was put on by a reporter, the handwriting on it is Mr. Messenger's handwriting.

Mr. Erskine: Yes. I will come to that. I would like to have this introduced in evidence.

Mr. Lasky: I have no objection.

(The document referred to was thereupon received in evidence [665] and marked Defendant Exhibit V.)

The Court: This is the bank's copy. We have already introduced the original.

Mr. Lasky: It has already been introduced, the advice that went out to the Bank of America. This

(Testimony of Frederick C. Messenger.)

is the copy that the Merchandise Bank would retain in its own files.

Mr. Erskine: This is the Merchandise Bank's permanent record.

Mr. Lasky: Yes.

The Court: Is there some necessity to have both?

Mr. Erskine: This is a point here, your Honor, that I want to mention.

The Court: All right.

Mr. Erskine: I think we can get a stipulation to this effect: the words "reversed and returned unpaid, 11-19-48 per A.R.LeRoy," with the initial underneath "M" are in the handwriting of the witness.

Mr. Lasky: That is right.

Mr. Erskine: And were put on there November 19th.

Mr. Lasky: Yes, that is right.

Q. (By Mr. Erskine): After the witness had talked to Mr. LeRoy about what had taken place in California, is that right?

A. Are you addressing a question to me now?

Q. Yes. A. Yes. [666]

The Court: Very well.

Mr. Erskine: And the stamp on this thing too, "paid November 15th, Merchandise National Bank" is the stamp of the bank.

Mr. Lasky: Yes, and if you are going further, there is a line drawn through the word "paid" and the line was put through the word "paid" when he wrote the notation on here.

(Testimony of Frederick C. Messenger.)

Mr. Erskine: That is all right.

Q. Mr. Messenger, without digging up the papers, the Merchandise Bank sent out not only the advice of credit but also an acknowledgement of receipt of the six checks on the same day?

A. That is correct.

Mr. Lasky: That is in evidence.

Q. (By Mr. Erskine): It was the usual practice of the Merchandise National Bank, was it not, in a situation in which they were entering checks received by them, drawn on them as debits, when they were entering them as debits, to send out with the collection letter, when they were receiving such checks, with the collection letter, an acknowledgement and the advice at the same time?

A. No, the practice of the bank in receiving from any other source was to acknowledgement the receipt of the collection and then, of course, the advice would be the disposition of it. Now, they are not both handled at the same time. It might be that both went out on the same day. [667]

Q. Well, it is not important, but on page 34 of your deposition you testified as follows:

“Q. Is it the practice of your bank on receipt of a collection to send out an acknowledgement to owner and on the same day send out the advice on the disposition of the item to the owner.

“A. If the collection is paid on the date it was received then the practice is to send the acknowledgement and also the advice.



(Testimony of Frederick C. Messenger.)

“Q. And that was done in this instance?

“A. Yes. sir.”

The Court: That is what he has just testified to, isn't it?

Mr. Erskine: Well, I did not quite understand it that way, but substantially that way.

Q. Now, Mr. Messenger, during 1948 up to November 17th whenever United Produce Company was drawing against uncollected funds in its commercial account, your bank would charge the United Produce Company interest on such drawings, would it not?

A. I knew nothing about anything at all of the United Produce Account prior to November 17th. Now, if you are asking me about what I have found out since, perhaps I could answer it.

Mr. Lasky: Never mind what you have found out since.

Q. (By Mr. Erskine): I am asking you if it was not the practice of your bank—let me put it this way—to charge a [668] customer interest on checks drawn by your customer against uncollected funds?

Mr. Lasky: I think that is immaterial. It has no bearing on any issue in the case whatsoever whether they charged or did not charge interest. If they did, it would be appropriate, if they did not it would be irrelevant.

Mr. Erskine: It has this bearing, your Honor: one of our points is that the Merchandise Bank was loaning the United Produce Company in ex-

(Testimony of Frederick C. Messenger.)

cess of the legal limit, creating the credits which made possible the continuance of this kite. We want to show as part of that situation that the Merchandise Bank was charging the United Produce Company interest on the float or the drawings against uncollected funds, and that that was considered by the bank as part of the indebtedness owing by United Produce Company to it. On which it was charging United Produce Company interest. That is the purpose.

The Court: What difference would it make?

Mr. Erskine: It shows the bank regarded the float as an obligation to it upon which it was entitled to interest. That is the purpose.

Mr. Lasky: In the first place, if the Court please, if it is a loan, it is a loan whether they charged interest or not. But beyond that I think we have reached a point where there should be a disposition of this whole contention, that whether or not we exceeded the loan limits has no bearing on this case. [669] Obviously it cannot have a proximate casual relationship. Suppose our bank, instead of being a relatively small bank, was a huge bank with large assets and capital—say assets and capital of \$100,000,000—in which event its loan limit to any single customer would have been \$10,000,000. It would have had no bearing on the Bank of America. Then we would not have been violating the loan limits if we lent up to \$9,000,000 to this customer. How could the fact that our bank was a much smaller bank instead of a much larger

(Testimony of Frederick C. Messenger.)

bank, so that a certain amount of loans may or may not have been too high, have any bearing on a loss that the Bank of America has suffered? And that is only part of the question because only the Federal Government can raise the point.

Mr. Erskine: May I answer that, your Honor?

The Court: I do not want to rule upon the matter at this point. If counsel want me to, of course, I can, but I think it is to the advantage of all parties that I do not rule upon it at this point, so that I fully understand the position of both sides to the question. But aside from that point, now, with reference to this immediate point, I do not follow your position there, counsel. Can you explain that to me so I can see what bearing it has on the matter?

Mr. Erskine: Section 84 provides that no obligation shall be incurred by any person to a national bank in excess of 10 per cent of the capital and surplus. I want to show and it will be [670] our contention that when a bank permits a customer to draw against uncollected funds, the customer is not using his own funds, but using the funds of the bank and that therefore the customer is incurring an obligation to the bank and that the bank recognizes that as such by charging him interest on the uncollected funds, on the float.

The Court: The relationship of debtor and creditor exists whether you call it a loan or what you call it, does it not? What difference does it make? The amount of the loan and the bank's financial

(Testimony of Frederick C. Messenger.)

condition with reference to the amount of the loans it could grant is already stipulated to and is in evidence, isn't it?

Mr. Lasky: I do not believe that has been reached yet.

Mr. Erskine: I do not believe it has.

Mr. Lasky: It is a fact we can readily stipulate to. Of course, we will object to its relevance.

The Court: Whether it exceeded that is a fact that you can stipulate to in any event.

Mr. Lasky: No, the point is, your Honor, that counsel has not stated Section 84. Section 84 has a series of 10 or 15 exceptions which do not come under the limitation. This, for example: If this were a loan against the checks, it would fall under one of the exceptions, which is a loan against commercial paper, namely, checks endorsed by the payee covering the signature of the maker. We certainly would not stipulate [671] that we exceeded the loan limits because we definitely deny any such thing. The loans not clearing under the exemptions, we say, were under \$200,000. Those others were definitely covered by one or the other of the several different exemptions. And this matter of checks, if it is a loan to permit a customer to draw against deposited checks before collection, that is, within our judgment, within one of the exceptions. That is why this issue complicates the case.

The Court: It just keeps growing, but the Court is in a position with being stuck with it at this

(Testimony of Frederick C. Messenger.)

point, and I am going to receive the evidence so I can rule on the entire thing. Proceed. [672]

A. No, we made no such charge at all. You are talking about analysis and results. In the analysis of accounts——

Mr. Lasky: I move to strike the witness' last remark as non-responsive. He said they made no interest charge. That is the responsive answer.

The Court: Very well; it may be stricken.

Q. (By Mr. Erskine): You did make a charge against the customer, an interest charge against the customer which included as one of the elements of the charge, or one of the elements upon which the charge was based, the amount of the float of the customer—the amount of float in the customer's account; is that right?

A. We made a charge against our customer's accounts after considering all activities; debits and credits in the account, we made a net charge of what results were discovered or disclosed, rather.

Q. And one of the elements upon which you based that net charge was the amount of float in the account if there was any such float?

A. If there was such a float, it would be considered as an element.

Mr. Erskine: I think that is all, your Honor.

Mr. Lasky: No questions.

The Court: Very well. Call the next witness.

Mr. Erskine: I haven't got any more witnesses at this [673] juncture, your Honor, but I have the depositions we can discuss.

The Court: All right; what is the situation with reference to the depositions?

Mr. Lasky: Counsel gave me last night a list of several hundred pages, and I looked them over, that is all I know about them. Most of them seem to be identifying documents.

Mr. Erskine: That is right; most of them do deal with that, your Honor.

The Court: You can stipulate as to the documents then? Is that all that is——

Mr. Erskine: Well, the deposition contains descriptions of the documents.

The Court: As to what the documents are, you can stipulate as to what the documents are.

Mr. Lasky: What I would suggest he do is to make an extract from his depositions or make his descriptions on paper and we could put it in as a stipulation, if they are material. A lot of these documents are already in. They seem to be referred to. A lot of them I think are merely irrelevant, others are duplications, and so forth.

Mr. Erskine: It would be a monumental task. It isn't like summarizing the testimony of Lofendo and Gassman. Mr. Messenger's deposition covered, according to my recollection, some 500 pages, and if I were to attempt——

Mr. Lasky: Six hundred pages. I think you even got up to [674] 600 before you were through.

Mr. Erskine: If I attempted to do what counsel suggests, it would take me at least a week's time. I believe it would be better to suggest that I be permitted to introduce in evidence the por-



tions of Messenger's deposition which I have already indicated to counsel, I don't think it will take much time. I could file a paper stating the pages with the reporter.

Mr. Lasky: There are some parts of this, great parts of it, I think do not belong in the case at all.

Mr. Erskine: I consider that all the parts indicated belong in the case, your Honor.

Mr. Lasky: Do you propose to offer in evidence all the documents which are identified here? You used a clam shell dredge in the depositions and dredged up all the records we have, practically. Is all of it going in?

Mr. Erskine: Yes, I am going to offer it all in evidence as part of my case, all those exhibits that I have indicated here, unless we can stipulate to the schedules prepared by Mr. Tobey upon the basis of those exhibits, which schedules I gave to counsel yesterday.

The Court: Then if a stipulation can be made with reference to the schedules we can eliminate all of the other documents and depositions?

Mr. Erskine: We can eliminate a large part of the Messenger deposition; yes, your Honor. [675]

Mr. Lasky: I am prepared to talk on this question of schedules, and almost none of them are in a form I would stipulate to. I don't think that we would have any trouble arriving at a stipulation on some of these matters. I am prepared to take them up with you in open court or in chambers, or between the two of us. I think we can make some progress that way. You gave us five schedules.



Mr. Erskine: Yes; there were a couple more that were not entirely completed.

The Court: How many of the witnesses are you going to have?

Mr. Erskine: I think, your Honor—I am not positive of this, but I think I will call two more witnesses.

The Court: Who will they be?

Mr. Erskine: Well, I am considering this; I don't know whether I will do it or not; I haven't thoroughly made up my mind yet on that. We have these stipulations to take care of and the depositions and so forth, and that is going to consume some time, at least an afternoon, I believe. It occurred to me that I would like to call—that I may call—I haven't made up my mind to it—that I may call two expert witnesses, one an accountant, and one a banker, to testify with respect to the practices of the Merchandise Bank in this case and the practices of its auditor.

Mr. Lasky: Expert witnesses to testify that they considered [676] the practices of Merchandise were good or not good banking practice?

Mr. Erskine: Well, it might not be quite as blunt as that, but it would amount to that.

The Court: Then what good would it do me?

Mr. Erskine: It is our contention, your Honor, that the Merchandise Bank was negligent in this case.

Mr. Lasky: You mean we have got to get experts too on the same subject?

Mr. Erskine: Well, perhaps.

Mr. Lasky: Which I could get without any trouble.

Mr. Erskine: Perhaps you could and perhaps you couldn't. I don't know.

The Court: You know, I just don't think that an expert knows anything more about it than anyone else does, as to whether or not a loan should be made. The relationship between a bank and a customer is one that I just don't believe you can expert. The confidence that you have in your fellow members of the bar, as to some of them it is one thing, and as to others it is another. Now how can that be experted? Whether or not I have or should have confidence in any particular person cannot be the subject of expert testimony. And that is the whole relationship between banks and customers, is one of confidence, personal confidence.

Mr. Lasky: Exactly. [677]

The Court: That is the whole history of banking, isn't it?

Mr. Lasky: If your trust is misplaced in somebody, you get swindled.

Mr. Erskine: I don't think that that is the situation here.

The Court: Then you are going to have them testify of course under these circumstances this bank should not have had any confidence in the United Produce Company?

Mr. Erskine: No, I am not going to say that. For example, I am going to say in this case that an accountant, if I call him, and as I haven't made up my mind on it—I can call his attention

to the condition of the United Produce Company books, the findings that Mr. Tague made with respect to those books and I may ask him whether or not upon an order that those books which will be presented to him, certain facts would be disclosed following out the usual and ordinary accounting procedure, auditing procedure.

The Court: You can stipulate to all that. The record speaks for itself. I am sure you will not have any difficulty on that score. The ledger reflects the balance or condition, what the condition between the bank and its customer is. I think you can all stipulate to that. But certainly an expert cannot tell anyone as to whether or not—Of course the bank may have made a mistake, and the Bank of America may have [678] made a mistake, but it isn't based upon a question of expert testimony. It just is of no assistance.

Mr. Lasky: In effect, what counsel is doing is to call or propose to call a grandstand quarterback after the game is over and to say "Now looking at it in retrospect you can see that you made a mistake." We know that ourselves.

The Court: You can still present the testimony. I will consider the matter in the meantime, because I don't just see upon what basis it would be worth anything in the determination of the matter.

Mr. Erskine: As I said to the Court, I am not convinced myself that I will present it, but I am considering it. If I reach a conclusion that I feel it is essential for me to do so, I would like an opportunity to present it, or to offer it at any rate.

The Court: Yes, and then that will be all?

Mr. Erskine: That will be all.

The Court: In other words, you are through with the live testimony if you decide not to produce some experts?

Mr. Erskine: That is right.

The Court: Then we will meet again this afternoon, and if you are going to have other witnesses, have them here at two o'clock.

Mr. Erskine: I can't have them here at that time, your Honor. [679]

The Court: Why not?

Mr. Erskine: I haven't got them prepared.

The Court: Mr. Erskine, that isn't—when are they going to be prepared.

Mr. Erskine: I thought I was going to have until Monday, and there is plenty to do between now and Monday in this case with the depositions and the stipulations.

The Court: Can you finish up all of the work, can you have all the stipulations and everything completed by Monday?

Mr. Erskine: I haven't dictated the end of that long stipulation on which we were working, but I planned on getting that out either this afternoon or tomorrow and I probably could discuss it with Mr. Lasky tomorrow and see if he and I could reach an agreement on it.

Mr. Lasky: I will be available at your pleasure at any time late this afternoon or any time on any of this work.

Mr. Erskine: But I have an idea that—

The Court: For example, if it got to this point, Mr. Erskine, where you decided to present your experts and I decided to hear them, do you have any idea how long those experts would take?

Mr. Lasky: There would certainly be cross-examination.

The Court: I think they would be here for a week under those circumstances. You better get your experts. What do you have to do with an expert to prepare him? If he is an expert, [680] all you have to do is to propound your questions to him.

Mr. Erskine: Well, he has to see the papers upon which I am going to question him.

The Court: You can present them to him here in Court.

Mr. Erskine: He won't have any opportunity to study them and consider them and to reach an opinion about them.

The Court: Well, we will find out about that. Bring him here. Have him here at two o'clock.

Mr. Erskine: I can't get him here at two o'clock.

The Court: Why not?

Mr. Erskine: Because they are not available; they won't be available at two o'clock.

The Court: Have you subpoenaed them?

Mr. Erskine: No, I have not.

The Court: You get hold of them and get them here at two o'clock and we will proceed. I am not going to waste today and tomorrow, Mr. Erskine. You get your witnesses and we will be ready to go at two o'clock with them.

Mr. Erskine: Well, they won't be here; I can't get them here.

The Court: Well, that is, of course, up to you. I have advised you all along how many days we have immediately available to us. Of course I understand that we have got time available in the future ad infinitum, but that doesn't relieve your responsibility, Mr. Erskine, to have the witnesses here. [681] Now just to say that they can't be here is no proper excuse to the Court unless you can tell us why they can't be here.

Mr. Erskine: Well, I think I have made it pretty clear to the Court that I have not yet gone over the facts with them with respect to which I may want their opinion. I don't know whether I will offer the evidence.

The Court: I know, but the case has been set for trial. How long has it been on the ready calendar?

Mr. Lasky: About three weeks on the ready calendar.

The Court: We have been here in Court for ten days.

Mr. Erskine: Yes, but I have done an enormous amount of work on the case while the case was being tried, and there is plenty of work to do in the case between now and Monday. And I understood that I was going to have Monday if I needed it, and I thought I could—as a matter of fact, I have engagements with these men on Sunday; at least, I have an engagement with one of them Sunday. However, if that is the best I can

do, if the Court insists that they be here, the only thing I can say is that I can't get them here.

The Court: I will tell you, Mr. Erskine, I think in order for you to protect yourself in the matter, you had better make a formal showing this afternoon at two o'clock as to what you want to do and why you can't do it at this time, because I think you should be protected in the matter. You may have the opportunity to protect yourself, and I will consider the [682] matter further in the meantime. But you can observe my disposition in the matter.

Mr. Erskine: That is pretty clear, your Honor.

The Court: As I say, I don't think that it is fair to the Court to be continuing the matter when it is obvious that if the evidence is admissible and the Court hears it, it is going to take a considerable time.

Mr. Erskine: Well, not as I envisage it.

The Court: Not as you do, no. Of course your matter is simple; you prepare your expert, and you ask him one or two questions—qualify him and ask him one or two questions, but the cross-examination is unlimited when you get to that sort of thing.

Mr. Erskine: As I understand it I don't believe that would be the case here. Of course I have been mistaken before in matters of that sort. However, the way I contemplated the course of the trial was that I was to deal with these depositions; we have these schedules which I have presented to counsel; we have the stipulations which have



not been completed and which have taken considerable time and which will take considerable more time.

The Court: It was my understanding that all this was going to be done with reference to the stipulations and the reduction of the depositions, was going to be done and agreed to between the two of you out of court, and then if there [683] were any questions that then arose you would come to see me during the next week during the judicial conference. Wasn't that the understanding?

Mr. Erskine: We can handle it that way, your Honor.

The Court: That was what I understood.

Mr. Erskine: We will handle it that way if the Court wishes.

Mr. Lasky: If that is the way to handle it, that is the way to handle it. I had not myself understood that to be so, and I was hopeful that the case would be concluded because I don't like to hold these gentlemen from Chicago until the following week, as I would have to do if I had any rebuttal. But if that is the way it has got to be, that is the way it has got to be. We are going to try this case to a conclusion.

The Court: Yes.

Mr. Lasky: But I don't see why it ought to take that amount of time. I have been handed five or six schedules. I thought we were going to have schedules which merely summarized figures on the books. They are not. They tend to be comparisons of one book with some other person's

record put together in the form of an argument. That is what they really are according to our theory. We would break them down and put in one set of figures. And if counsel on argument wants to correlate them, that is different.

The Court: Yes. [684]

Mr. Erskine: I don't agree with counsel's interpretation of the schedules. It is true they relate to more than one record, and they are drawn off of the records as we understand them.

Mr. Lasky: Some of them, for example, apparently by Mr. Tobey are based upon a comparison of Bank of America records with our records and the Bank of America records were not accessible to us at the times in question, and they tend to prove facts to which we would have had not access at the time. Because they have not been extracted by Mr. Tobey, is no reason——

Mr. Erskine: That is just what the facts are, all the records.

Mr. Lasky: All right, but those things I can't stipulate to. And before I would agree to such a schedule going in, I would want it definitely established, either by stipulation or let you do it by testimony—if we are to be held chargeable with negligence, which is the theory of the defense, upon the basis of knowledge we could not have had, at least I want the record to show what the schedules are. There are several things like that which I think we can dispose of pretty quickly when we sit down together.

Mr. Erskine: I don't agree with your interpre-

tation but be that as it may I would like to sit down and try to agree with him about it. [685]

The Court: Do you think it could be worked out quicker by working in Chambers with me?

Mr. Lasky: I am inclined to think so, if the Court please. If I may put it this way, I think the Court acts as a catalyst in such a matter and facilitates it.

The Court: It may very well be that you eliminate some arguments between counsel sometimes.

How can we finish the case and give you all a full opportunity? I don't want to cut you out, Mr. Erskine, but goodness, I don't understand how you come up to the trial of the case and do not have your witnesses available.

Mr. Erskine: Well——

The Court: This isn't the matter that has just arisen. This case, in your theory of it, has been in your mind from the start.

Mr. Erskine: That is right.

The Court: We will adjourn until 2:00 o'clock this afternoon, have your witnesses here. You say "of course I haven't talked to them."

Mr. Erskine: That is so, your Honor, but I assure you that I have been plugging away at this case.

The Court: I know you have, Mr. Erskine.

Mr. Erskine: The material is enormous and I have been working quite hard at it. And it is also true that the time that ordinarily would intervene between now and Monday morning [686] isn't very long and that there are plenty of things that can be done in that time. However, I don't know——

The Court: If we work this afternoon and tomorrow on these various matters that are here, then on Monday you will have your other witnesses then available?

Mr. Erskine: I am not sure that I am going to call them, your Honor; I haven't made up my mind.

The Court: Then of course we are up against this other proposition; that then during the rest of the week if we are not through with those witnesses on Monday, we are going to have to start meeting at six o'clock in the morning until ten o'clock and from six or seven o'clock in the evening until ten or eleven o'clock at night. That is what we are going to have to do next week.

Mr. Lasky: May I make a suggestion for what it is worth? If we meet in the Court's Chambers this afternoon and have a Court Reporter available, I think as we move along we might be able to make a stipulation, button it up and move on to the next one instead of going back to our offices and trying type them.

The Court: Very well. The Court will recess at time. Counsel will meet with the Court in Chambers at 2:00 o'clock this afternoon and the reporter will be present. We may be able to make the stipulations and get them in the record and quickly dispose of some of the matters right then and [687] there.

Mr. Erskine: That will be fine.

The Court: Rather than waiting to have them written up and that sort of thing.

Mr. Erskine: That would be fine if we could do that.

The Court: Very well; the Court will recess.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [687-A]

Monday June 26, 1950, at 10:00 o'Clock A.M.

The Clerk: Merchandise National Bank vs. Bank of America on trial.

Mr. Lasky: Ready. If the Court please, I can bring up the subject of our resume of the Gassman and Lofendo depositions.

Mr. Erskine: Well, I have been over those, your Honor. Now first of all, taking up the Lofendo deposition, there is a part here that I couldn't find. I guess it is in there. Would you mind pointing out to me this part?

Mr. Lasky: Yes.

(Discussion between counsel out of hearing of the reporter.)

Mr. Erskine: Well, that seems to be all right, then, your Honor.

The Court: All right.

Mr. Lasky: Well then, it is therefore stipulated that the document I now have in my hand, entitled "Stipulation——"

Mr. Erskine: Pardon me just one second. Is there any reference to this proceeding?

Mr. Lasky: Yes, the very beginning (indicating).

(Conversation out of hearing of the reporter.)

Mr. Lasky: Well then, it is hereby stipulated, is it not, Mr. Erskine, that the paper I have in my hand, entitled "Stipulations concerning the testimony of Frank C. Lofendo" may be received in evidence as Plaintiff's Exhibit next in order, as truly [688] representing, for the purposes of this case, the testimony of Frank C. Lofendo?

Mr. Erskine: That is right.

The Court: Very well, marked in evidence.

(Whereupon stipulations concerning deposition of Frank C. Lofendo referred to above, were received in evidence and marked Plaintiff's Exhibit 23.)

Mr. Erskine: Now the Gassman deposition, your Honor, which I had a chance to go over carefully, and the Lofendo, presents quite a bit of difference and some difficulty. I personally believe it would be better to put the deposition itself in evidence than to put this statement in evidence, modifying as I believe it should be modified. I think it would save time and it would, too, I believe, have a certain benefit that would not be obtained by reading the statement, which benefit that is according to my view of it, at least, the witness upon testifying was making an effort to state very accurately the facts concerning which he was testifying. Now I would rather put in the deposition itself and go over this statement. I make that suggestion.

Mr. Lasky: Well, I mean, it is purely up to you. If you don't care to stipulate, that is all right.

The Court: Very well, let's put it in.

Mr. Lasky: Now, that raises just one problem. Incidentally I just offer the direct examination, because it so happened that [689] the cross-examination, so called, was not cross-examination at all but went into another subject matter entirely.

Mr. Erskine: I would like to say, my suggestion is that just the direct examination go in.

The Court: Very well, just the direct examination.

Mr. Lasky: All right, then, I will offer the direct examination of the deposition of Sam Gassman, taken on behalf of the Plaintiff, and it may be received, if your Honor please.

The Court: Yes.

Mr. Lasky: Now the one problem that may take a moment is that there were numerous exhibits marked for identification here, and I think we ought to go through here and by stipulation agree as to what they were, so we won't have to start putting them all in those exhibits, putting all those exhibits in evidence at this time.

Mr. Erskine: That's right. But I would like to put in the list, exhibit 16, the two lists.

Mr. Lasky: May I ask then that that deposition be now opened?

The Court: Yes, the deposition may now be opened.

(Whereupon conversation was had among court and counsel regarding whereabouts of said deposition.)

The Court: Well, the Court will stand in recess for fifteen minutes, and we will see if we can get



in touch with the other clerk. I will look in Chambers and see if by chance it is in there.

(Recess.) [690]

Mr. Lasky: We have located it.

I have gone through the list of some 19 groups of exhibits in the deposition, and I would like counsel to give me one stipulation which will avoid putting in complete photostatic deposit slips of the East Bakersfield Branch. Those were all shown to the witness, and the witness asked as to whether they were in his handwriting. He said one group was and one other group was not.

Mr. Erskine: Yes.

Mr. Lasky: Instead of putting in all these various groups, can we not stipulate in the form in which I proposed in the proposed draught stipulation; that the witness was presented with all the deposit tags in the Lofendo account, taken from defendant's files, and testified that all of the deposit slips dated on or after September 16, 1948, were filled out in his own handwriting, including the name "Frank C. Lofendo" written at the top of each slip as the name of the depositor; that on the deposit tag dated November 10, 1948, which has already gone into evidence in this case, the writing at the top: "Frank C. Lofendo, Bakersfield Inn, November 10, 1948," was in the witness' handwriting, and the numerals below are in the handwriting of one of the employees of United Produce Company working under him. This will obviate the necessity of putting in those several

groups of deposit tags in order to correlate them with all the original deposit tags which we will also have to put in [691] evidence further.

Mr. Erskine: I will so stipulate.

The Court: Very well.

Mr. Lasky: Then I would like to offer in evidence——

Mr. Erskine: Does that cover the amounts? Whose handwriting were the amounts?

Mr. Lasky: Everything was in his handwriting on all of the deposit tags from and after September 16, except on the one of November 10, in which the name at the top and the address and November 10, are in his handwriting, and the numerals underneath are in the handwriting of one of the employees under him.

Mr. Erskine: When you are referring to "his," are you referring to Gassman?

Mr. Lasky: Gassman personally.

Mr. Erskine: Yes, that is right.

The Court: Very well.

Mr. Lasky: I offer in evidence, if the Court please, at this time the exhibits which were marked on the Gassman deposition for identification as Plaintiff's Nos. 7, 8, 9, 14, 15, and 16. Do we have those available here? Perhaps I have the originals right here.

Here is 7.

The Clerk: This is number 16. They would be given——

Mr. Lasky: Those are photostats. I have the originals in my possession. The originals were re-

turned to me and the [692] photostats were returned with the deposition. That is correct?

Mr. Erskine: Yes.

Mr. Lasky: That is 7, which will go in as Plaintiff's Exhibit——

The Clerk: Plaintiff's Exhibit 24 in evidence.

Mr. Lasky: Then 8 on the deposition.

The Clerk: 8 on the deposition will be Plaintiff's Exhibit 25 in evidence.

Mr. Erskine: 9 will be 26.

The Clerk: Plaintiff's Exhibit 26 in evidence.

Mr. Lasky: I also want to offer 13.

The Clerk: Plaintiff's Exhibit 27 in evidence.

Mr. Lasky: There is a group which together was marked 14, which will go in as 28.

The Clerk: Plaintiff's Exhibit 28 in evidence.

Mr. Lasky: No. 15 was just a huge book of blank checks; I don't see any point of putting that in.

16 is the pencil memorandum.

Mr. Erskine: That is the memorandum?

Mr. Lasky: That will go in as the next one.

Mr. Erskine: Was it two memorandums or just one.

Mr. Lasky: No. It is one memorandum, two columns, one on each side of the sheet.

The Clerk: Plaintiff's Exhibit No. 29 in evidence.

Mr. Lasky: If the Court will pardon me just a moment, I [693] have two or three more exhibits to check through here to see what they were.

The 17 group.

The Clerk: Plaintiff's Exhibit No. 30 in evidence.

Mr. Lasky: In order that we may avoid putting in a lot more papers, may it also be stipulated that when the witness testified that he kept in the files of United Produce Company triplicate copies of the deposit slips that had gone to the East Bakersfield Branch, and produced them those that he had were copies of the deposit slips that had gone to East Bakersfield?

Mr. Erskine: That is right.

Mr. Lasky: And when he said that he received back duplicate copies, that the ones that he produced as the duplicates are in fact, the duplicates?

Mr. Erskine: That is right.

The Court: Very well.

Mr. Lasky: Then I think the last group I have here, Mr. Erskine, will be the last group of exhibits which were numbered 19, instead of putting them in evidence—they were forty odd checks—I would like a stipulation from you that Exhibit No. 19 consisted of forty-two original checks of United Produce Company, each payable to Frank C. Lofendo, bearing the rubber stamp endorsement "Frank C. Lofendo," drawn on the Merchandise National Bank, and these in fact constitute the last thirty-eight items which had been credited to the Lofendo Account [694] at Defendant's Branch prior to November 10, 1948, plus four checks which were credited at the East Bakersfield branch on November 17. I have checked them against the record, and that is precisely what they are.

Mr. Erskine: Well, if you say that, Mr. Lasky—it is a little difficult for me to follow—if he says it, I will take it, subject to my rights to check against it and to call to the Court's attention and to Mr. Lasky's, any error I may find.

The Court: Very well.

Mr. Lasky: I would like to leave with the Court, it isn't an exhibit, of course, this proposed stipulation with reference to the deposition of Gassman, simply with my representation and it is a resume of the testimony.

The Court: Submit it with your memorandum.

Mr. Lasky: With the memorandum?

The Court: Yes.

Mr. Lasky: I will do that.

Mr. Erskine: Your Honor, in chambers the other day, on Saturday, we were discussing certain things which I would like to take up first.

There was a discussion, as I remember it, as to whether or not Mr. Tobey and Mr. Messenger could get together and agree on a stipulation with respect to the amount of the float in the Merchandise account with the East Bakersfield Branch. My understanding [695] is that they got together—whether or not they agreed I don't know—but we have here a schedule showing the amount of the float in that account, the account of United with Merchandise.

The Court: Do you think, gentlemen, we would proceed faster if you went into chambers and sat around the desk or table in there with reference to this if there is going to be some further discussion as to what this does represent?

Mr. Lasky: My impression—I haven't seen seen what he has there—is that we can proceed without any difficulty right here.

The Court: Very well.

Mr. Erskine: Perhaps you could look at that.

Mr. Lasky: Let me ask Mr. Messenger.

Well, I will stipulate that the document that Mr. Erskine has given me—this document is called “Analysis of Checks of Frank C. Lofendo deposited to United Co. Commercial Account”—and I make no stipulation with respect to that caption.

Mr. Erskine: We will strike the caption then.

The Court: The caption may be stricken.

Mr. Lasky: What I do stipulate to is that the document correctly shows the dates on which checks in certain amounts were deposited, or rather credited, on United Produce Co. Commercial ledger sheet with Plaintiff's Bank. It also shows the date upon which they were assumed to be good, on the assumption [696] that in four days they were good.

Mr. Erskine: Under the column “Date Good.”

Mr. Lasky: Under the column “Date Good” and that under the last column entitled “Float,” Mr. Tobey has correctly used the arithmetic to determine the amount of float, which in every case is the amount of checks; is that right?

Mr. Erskine: Yes.

Mr. Lasky: All right.

The Court: Very well.

Mr. Lasky: I make my objection to the materiality.

The Court: Yes, surely. It is admitted, as most

of the evidence has been, subject to the objections on each side.

Mr. Erskine: I would like to have this then marked, Mr. Clerk, as Defendant's Exhibit next in order.

The Court: Yes, it may be marked and admitted in evidence.

The Clerk: Defendant's Exhibit OO in evidence.

Mr. Erskine: Now, Mr. Lasky, do I understand you to say that you will not stipulate that these checks covered by this Exhibit, Defendant's exhibit OO are not the checks of Lofendo deposited to the Credit of United Produce Company in the Merchandise National Bank?

Mr. Lasky: No, I won't stipulate that, because I know nothing about it. I understand that these figures compare and are identical with figures appearing in the Lofendo account on days near to the dates of these checks, but whether or not they [697] are Lofendo checks I have no way of knowing. You may draw your inference that as same amounts here on closely related dates they are the same checks.

Mr. Erskine: They are the same items that appear on the Gassman list.

Mr. Lasky: I wouldn't be surprised that that is so, but I don't know.

Mr. Erskine: Would you pardon me one second, your Honor?

The Court: Yes.

Mr. Lasky: With respect to the Gassman deposition, I am not sure what practice we have been



following—whether I asked that it be offered in evidence and it should be marked as the Plaintiff's Exhibit or not. If so, I would do it.

Mr. Erskine: I didn't hear that, counsel.

Mr. Lasky: I was referring to the Gassman deposition, your direct examination. I don't believe we gave it an exhibit number.

The Court: Was a number given to it?

The Clerk: No.

The Court: I think that we gave the other deposition that was in a number.

Mr. Lasky: Yes we did.

The Court: Assign a number to it, the next in order.

The Clerk: The deposition of Sam Gassman is Plaintiff's Exhibit No. 31 in evidence. [698]

Mr. Lasky: Of course, that pertains just to the direct examination.

The Court: Just to the direct, yes.

Mr. Erskine: In view of the point that counsel and I were just discussing, that is, the question whether or not the checks referred to in the last exhibit were checks of Lofendo drawn on the East Bakersfield Branch and deposited to the credit of United Produce Company account in the Merchandise Bank, I would like to introduce these checks, which were the November checks which the Bank of America retained and still had in its hands when the blow-up occurred.

Mr. Lasky: You won't need to do it, counsel. If you have you have actual checks showing Lofendo

items, so that we know they are Lofendo items, I will stipulate that those checks on your list are Lofendo items.

Mr. Erskine: I see.

Mr. Lasky: While we have facilities while we can readily determine that, I will accept it.

Mr. Erskine: There are the checks.

Mr. Lasky: Mr. Tobey, you have in fact taken these checks and checked them off against your list?

Mr. Tobey: Yes. Not only that, I have checks of all this in here.

Mr. Erskine: We will come to that later.

Mr. Lasky: All right, if Mr. Tobey says so with this before [699] him, I will stipulate that for the items—I suggest you just put a bracket opposite those items on your list—we'll stipulate that the items so bracketed are Lofendo items without prejudice to your contention that the rest are also Lofendo items.

Mr. Erskine: Yes.

The Court: Very well.

Mr. Erskine: Will you indicate that on the list in an appropriate way, and I will call it to the Court's attention when it is done.

We had the other day the customer's ledger sheets presenting the commerical of the United Produce Company with the Merchandise National Bank and we had checks on both sides marked in red. I'm wondering, counsel, if you will stipulate to that?

Mr. Lasky: We discussed that the other day. I couldn't stipulate to that, because I don't think

there is any way you could determine those are Lofendo items.

Mr. Erskine: Then, I think later on in the morning I will put Mr. Tobey on and ask him to testify with respect as to how these exhibits were prepared. Then I will offer them.

Mr. Lasky: You won't even need to do that. If Mr. Tobey will tell me how he prepared them, I will stipulate that that is how he put those Red lines through, but I don't think the inference may flow from that they are Lofendo checks.

Mr. Erskine: Pay attention to this now, Mr. Tobey, and correct me if I am incorrect. So far as the debit items are [700] concerned on the sheets, the commerical ledger sheets just mentioned, Mr. Tobey examined the microfilm exhibit 1 for identification on the taking of the Messenger deposition, which showed the face and back of each checks charged against the account, showed as a picture, showed as a picture of each check, and he found that the items marked in Red on these sheets on the debit side were checks drawn by the United Produce to the order of Lofendo, and upon that basis he would state if he testified that the checks on the debit side marked in Red were such checks. And Mr. Lasky has stipulated that he has so testified.

The Court: Very well.

Mr. Erskine: So far as the credit items are concerned on these ledger sheets, the same stipulation applies to them as the checks just described in Defendant's Exhibit OO. We have certain of those cancelled checks that were in the hands of

the East Bakersfield Branch of the Bank of America at the end of November of 1948, checks drawn by Lofendo to the order of United Produce Company. We have those checks, and, therefore on the basis of those checks we can show that the checks on the credit side of the ledger sheet marked in Red were the checks drawn by Lofendo to the order of United Produce Company, so far as those checks just mentioned are concerned. Then, so far as other checks on the credit side are concerned, Mr. Tobey would testify if he were called as a witness that he checked the checks on the [701] credit side of the United Produce Company Commercial Account with the Merchandise National Bank against the list of checks shown on the Gassman list which has just been introduced in evidence in this case and marked Plaintiff's exhibit 29. Which shows on one side the checks of Lofendo drawn to the order of United Produce Company. Those checks are the checks on the right hand column headed with the words "Checks issued." Mr. Tobey checked the items appearing on the ledger sheets of the Merchandise National Bank and the United Produce Company account with the Merchandise National Bank against such checks, the checks listed in the Gassman list Defendant's Exhibit 29, for the purpose of identifying the checks marked in Red on the Exhibit which I am about to offer on the credit side of the ledger sheets as the checks drawn by Lofendo to the order of United Produce Company. He also checked such checks

against the ledger sheet of the Commerical Account of Lofendo with the Bank of America, and he found that the amount of the items marked in Red in the sheets in which I am about to offer were the same in amount as the amount of the checks debited against the Lofendo account in the East Bakersfield Branch of the Bank of America, and that that the dates correspond, with this exception: that the dates of the checks in the exhibit which I am about to offer on the credit side of the ledger sheet of the United Produce Company with the Merchandise Bank, were two or three days prior to the debit entry of the item in the same [702] amount appearing on the ledger sheets of the Lofendo account with the Bank of America. And upon the basis of the checks themselves, the—November checks we call them—and on the basis of the Gassman list, and on the basis of the ledger sheets of the Lofendo account with the Bank of America, used in the way I have attempted to describe he made the Red marks on the ledger sheets in the Exhibits which I am now offering and which I will ask the Clerk to mark.

Mr. Lasky: The last lengthy statement, of course, requires no stipulation whatsoever, because counsel has merely said that there is already in evidence a series of documents of one kind and another, and that the witness by comparing them found similarities on dates and amounts and that so and so is true. That is merely a statement of what is already in evidence, so I don't see that anything need be stipulated about it.

As for the document itself, in view of the fact that when counsel first referred to it in chambers, the objection was not reported, I would like to renew my objection not only that it is immaterial because the counterclaims are material in this case and should be stricken, but even with respect to those counterclaims it is wholly immaterial because it shows nothing whatever except that there were checks from Lofendo going into the United Produce Account and checks from the United Produce Company going into the Lofendo account, which is already in evidence. [703]

Mr. Erskine: I would like to have the details of the situation in evidence, your Honor, therefore I ask that the paper be accepted.

The Court: Very well; it is admitted subject to the ruling of the Court on Plaintiff's objection.

The Clerk: Defendant's Exhibit PP.

Mr. Erskine: Would you mind giving me Defendant's Exhibits? I want to make sure that the ledger sheet of the Lofendo Account with the East Bakersfield Branch is in evidence. I am positive it is, but I want to make sure.

The Clerk: The ledger sheet of the East Bakersfield Branch?

Mr. Erskine: That is one. Are there other sheets of similar nature?

The Clerk: There is another sheet similar to that.

Mr. Erskine: Exactly similar. It was my impression that they have gone in.

In the statement that I just made with respect



to the Lofendo Account with the East Bakersfield Branch, the ledger sheets of that account, I shall refer to Defendant's Exhibit C already in evidence, plus Defendant's Exhibit C-1 already in evidence.

The Court: All right.

Mr. Erskine: Mr. Tobey calls to my attention that in my statement I made this error: That I said that the corresponding item appeared in the ledger sheet of the Lofendo account prior [704] to the items appearing in the United Produce Company account. My statement should have been that it was subsequent, not prior.

The Court: I think that is what your statement was, as I recall it.

Mr. Erskine: I thought it was, too, but he mentioned it the other way.

The other day we had a talk, if the Court please, with respect to the schedule prepared by Mr. Tobey which I will now show Mr. Lasky. I would like this to go in with the columns which are headed, "Less Float on Deposits" and "Net Collateral Balances" stricken out.

Mr. Lasky: Hasn't this just been superceded by an exhibit we agreed to not over fifteen minutes ago? I thought that was what the other thing was, to take the place of this.

Mr. Erskine: Perhaps that is so. May I have a talk with Mr. Tobey?

I wonder, Mr. Lasky, if I could have the original ledger sheets of the United Produce Company Account with the Merchandise National Bank. Could I see those a minute?



Mr. Lasky: Of course you can, although you have got photostats of them here in evidence twice.

Mr. Erskine: Yes; the photostats, however, do not show the red figures, at least they don't to my eyes.

Mr. Lasky: All right. That's right. I am reminded that the Plaintiff Bank—you will recall it's a record of that [705] ledger consists of a microfilm of the statement which went to the United Produce Company and the original thereof is in the possession of the Trustee in Bankruptcy, so when we gave you the microfilm we gave you everything we have on that.

Mr. Erskine: Except back in Chicago we introduced these sheets. I think it was 20 and 21.

Mr. Lasky: Which you got from the——

Mr. Erskine: Trustee in Bankruptcy.

Mr. Lasky: Yes. I suppose he has them; we haven't.

Mr. Erskine: They are in the Messenger Exhibits there. I wonder if we could have them opened.

The Court: Very well, they may be opened.

Mr. Erskine: Mr. Messenger's Exhibits.

The Clerk: There are four of them.

Mr. Erskine: The beginning. Do they specify the beginning?

Mr. Lasky: To go off the record long enough to inquire, what is the purpose of counsel's present endeavors? I heard something whispered about noonday overdraft here. I don't know why that is

relevant. The noonday overdraft doesn't relate to the Defendant's situation.

Mr. Erskine: It has relevancy, I believe, your Honor, which I attempted to outline in the opening statement, which I will point out to the Court later on.

Mr. Lasky: We have already stipulated to some exhibits that have gone in that will show what we call the adjusted [706] balance for the day.

The Court: Well, I don't know what it is for——

Mr. Erskine: I will pass to something else.

I mentioned the other day that I would like a stipulation in order to eliminate certain exhibits, to the effect that the amount of drafts discounted by the Merchandise Bank for United Produce Company on each day from, let us say—the amount of outstanding drafts unpaid on each day during the period from July 1, to November 17, discounted by the Merchandise National Bank for United Produce Company exceeded the sum of \$200,000.

Mr. Lasky: Well, when we were in chambers on Saturday you confined yourself to the period October 1st and subsequently, and I checked that and I am prepared to give you the stipulation and now do give you the stipulation on every day after October 1st to November 16, 1948, the amount of outstanding drafts of the type you have referred to was \$200,000 or more.

Mr. Erskine: That will be satisfactory, your Honor.

The Court: Very well.

Mr. Erskine: Outstanding drafts unpaid, is that right?

Mr. Lasky: Yes. At that time you also agreed if we went into the subject of drafts you would stipulate that the number of drafts discounted by Plaintiff's Bank for United Produce Company in the months of August, July and September was 544 separate drafts of which five hundred and thirty-five were paid within the usual period of two to three weeks; that the remaining [707] 9 were recalled and others substituted in their place; that in the month of October 161 drafts were drawn and that only one draft was returned unpaid in October, another being substituted.

Mr. Erskine: Yes.

The Court: Very well. [707-A]

Mr. Erskine: If Mr. Lasky says those are the facts, I will accept that statement. We haven't checked it, but I will accept it and so stipulate.

The Court: Very well.

Mr. Lasky: Somewheres, Mr. Erskine, I suggest that we take up the stipulations the reporter got into rough notes, on Friday and give them to the reporter to copy into the record, because the reporter hasn't yet put them into the record.

Mr. Erskine: All right. Would you let me go along with the things I have got on my sheets and then we will come to that.

There was some discussion in chambers the other day to the effect that the obligation, what I call the net obligation of the United Produce Company to the Merchandise National Bank under notes exe-

cuted by the United Produce Company to the bank was maintained at \$200,000 dollars from the time—we can make it October 1st down to November 18th; is that right?

Mr. Lasky: I think we concluded that whatever you were driving at was covered by stipulations. I don't have those at my fingertips now.

The Court: The point is just making is of the \$200,000 line of credit you are referring to?

Mr. Erskine: That is right.

The Court: I think that is in in some way, but can't you——

Mr. Lasky: I think this is true: That at the end [708] month, which would be about the 5th of the next month, when new notes were executed, the new notes would always bring the total obligation outstanding on notes up to \$200,000.

Mr. Erskine: Well, the line of credit was maintained at \$200,000.

Mr. Lasky: It is not true that each and every day it was up to the \$200,000, but when the end of the month came and they had the monthly assignments and the monthly note, that did bring it back to \$200,000.

Mr. Erskine: Well, that isn't my understanding.

Mr. Lasky: I don't think it is a fact that it was true of each and every day.

The Court: Was it ever less than \$200,000?

Mr. Lasky: Yes; never more.

Mr. Erskine: My understanding was that if you applied the payments in the suspense account, the

payments recorded in the suspense account on account of the outstanding notes on any particular day, the difference was \$200,000. That represented the difference between the payments received on account of accounts receivable and the total notes outstanding, and that it was maintained constantly at \$200,000.

Mr. Lasky: It is not a fact, as I understand it, that each time remittances were brought in, checks, new notes were executed in an equal amount.

Mr. Erskine: Well, that is my understanding. However—— [709]

Mr. Lasky: That isn't the evidence.

Mr. Erskine: However, if it can't be stipulated to, I will put in exhibits with the Messenger deposition, your Honor.

The Court: Very well.

Mr. Lasky: I am assured by Mr. Messenger, and being so assured I will be glad to stipulate to it, that while it is not true, that throughout each day the notes were up to \$200,000, by the end of each day it was brought back to \$200,000 during this period; so instead of saying it was brought back at the end of each month I will now say it was brought back at the end of each day, is that correct?

Mr. Messenger: That is correct.

Mr. Lasky: I will stipulate to that.

Mr. Erskine: That was my understanding.

The Court: Very well. It is so stipulated. And that takes care of the matter and you don't have to introduce anything further.

Mr. Erskine: In that connection, your Honor, we discussed the other day in chambers an exhibit, a summary that Mr. Tobey had prepared, and it was agreed at that time that we had all the data shown in that exhibit already in the record somewhere, except that we did not have in there the amount of the new accounts receivable loans that were being made from time to time during each month. And I would like to have it stipulated that those are the correct figures under this [710] column.

Mr. Lasky: They are not the correct figures, but I said at the time we would look into the correct figures. And I won't state it the way you have said "new accounts receivable loans." I will state by way of stipulation the fact: that the aggregate amount of new notes in the following months, exclusive of the \$200,000—

Mr. Erskine: Yes.

Mr. Lasky: —is this: July, \$946,393.90, which happens to be the same as yours; August, \$941,536.96.

Mr. Erskine: Which also happens to be the same as mine.

Mr. Lasky: Yes. September \$832,920.06, which is different.

Mr. Erskine: Yes.

Mr. Lasky: October \$1,125,054.84; November up to the breakoff date, \$1,087,046.70. I will stipulate that those are facts and object to their materiality and to their introduction in evidence.

Mr. Erskine: We had—

The Court: Do you want to stipulate to those facts?

Mrs. Erskine: Yes, your Honor.

The Court: Very well.

Mr. Erskine: I would like to carry the stipulation one step further and that is, for purposes of our own, we broke the amount of notes executed during October into two groups: those executed during the period from October 1st to October 17th [711] and those executed during the period from October 18th to October 31st, and we would like to show that difference.

Mr. Lasky: I regret that I do not have the figures available. I did not make any such breakdown.

Mr. Erskine: Perhaps then we can introduce later the ledger sheets.

The Court: What would be the purpose of that?

Mr. Erskine: The purpose would be to show that new loans were increased after October 18th after they were told they couldn't draw against uncollected funds in the commercial account they increased their loans in the note account.

Mr. Lasky: If that is what you are driving at, we entered into a stipulation on Friday that beginning toward the end of October the amount of so-called float in remittances increased.

The Court: Yes.

Mr. Erskine: That is so, with the——

Mr. Lasky: And other exhibits show that they ceased on the commercial ledger. Now I don't know how many ways he has to show it.



Mr. Erskine: Well, I will try to take care of that.

The Court: Doesn't the stipulation referred to by Mr. Lasky cover the situation?

Mr. Erskine: Your Honor, I was just discussing it with Mr. Tobey. It doesn't seem to cover. We want to get the amount of new notes executed from October 1st. Now it is true [712] that in the long statement we discussed Saturday morning, we introduced the note ledgers—part of the note ledger and part of the assigned accounts receivable, but they did not go back to October 1st. If those sheets had gone back to October 1st we would have had this information, but they did not go back to October 1st. And the stipulation with respect to the float is something else again. It is something in addition to the point we have in mind.

The Court: Do you have the ledgers then that go back to October 1st?

Mr. Erskine: Yes.

The Court: Put them in and let it go at that.

Mr. Tobey: Mr. Messenger has the original.

Mr. Erskine: Yes. Perhaps Mr. Messenger would get the note ledger going back to October 1st, from October 1st through November 17th.

Mr. Lasky: Haven't you already put the note liability sheets in back to October 1st?

Mr. Erskine: No, according to Mr. Tobey they don't go back to October 1st.

Mr. Lasky: How far back do they go? Do they go back to October 17th? From them you can get

your figures for October 17th and offer it in evidence.

Mr. Erskine: All right; we will check up on exactly what we want in. [713]

The Court: The Court will stand in recess for ten minutes.

(Recess.)

Mr. Erskine: I would like a stipulation to this effect: On the photostats of the ledger sheets in the commercial account, Defendant's Exhibit PP, there are certain symbols following the figure in the farthest right-hand column; it is either a star or a circle. I would like to have a stipulation that those symbols mean this: if it is a star, it is a black balance; if it is a circle, it is a noonday balance.

Mr. Lasky: Frankly, I am unable to tell by looking at those photostats whether they are stars or circles or what. They are just black smears to me.

The Court: Let me see the exhibit.

Mr. Lasky: It is a fact that an asterisk will follow a balance which is a black balance. It is not true that there is any such thing as a circle.

Mr. Erskine: I mean it is the letters "o.d."

Mr. Lasky: Oh, "o.d."; that is true. I don't think you will be able to detect that by looking at those photostats.

Mr. Erskine: It is true that those are difficult, but there is another——

The Court: Where are the "o.d.'s"? I don't see any on there.

Mr. Erskine: We have a much clearer exhibit here, your Honor. You might glance at that. [714]

The Court: Oh, yes.

Mr. Erskine: This is much clearer than the other. This photostat was blown up back in Chicago.

I was just referring, if the Court please, to the symbols appearing upon the ledger sheets of the United Produce Company's commercial account. The star represents a black balance, as I said, and the initials "o.d." represent an overdraft—not a true overdraft, but a noonday overdraft. I ask counsel if he will stipulate that that is a fact.

Mr. Lasky: Yes, I will stipulate to those facts, and again I object to the materiality, because it has no relation even to these counterclaims. It has no more relevance if there was an apparent overdraft at noon, than if there was an overdraft at ten o'clock or eleven o'clock; it is just an interim figure.

Mr. Erskine: That is a matter of argument, your Honor.

The Court: Very well; upon the stipulation it may be marked and admitted in evidence, subject of course to the objection of counsel.

Mr. Erskine: I will offer in evidence another photostat of the ledger sheets of the commercial of the United Produce Company with the Merchandise Bank and ask that they be marked Defendant's exhibit next in order.

The Clerk: Defendant's Exhibit QQ in evidence.

Mr. Erskine: During the recess, your Honor, I spoke to Mr. Tobey about this business of whether or not we had the note liability ledger in evidence

for half of the month of October [715] together with the assigned accounts receivable ledger for half of the month of October, and he called it to my attention that we haven't got those sheets in evidence for half of the month; that the sheets in evidence in connection with the stipulation, Defendant's Exhibit NN, begin with—what was the date? About the 20th?

Mr. Tobey: Yes, about the 25th.

Mr. Erskine: About the 25th of October. So I would like to introduce at this time the sheets of the note liability ledger which I am now showing to counsel, which begin as September 29th.

Mr. Lasky: What are you asking?

Mr. Erskine: I would like to introduce those in evidence and part of the sheets that were introduced in evidence when we were discussing the stipulation Defendant's Exhibit NN but to be given a separate number.

Mr. Lasky: I will agree that these are true copies of what they purport to be.

The Court: Of the notes liability ledger.

Mr. Lasky: I object to that admission upon all the grounds heretofore stated and upon the further ground that it is immaterial.

The Court: Very well. Upon the stipulation they are admitted, subject of course to the Court's ruling upon the objection. [716]

The Clerk: Defendant's Exhibit RR.

Mr. Erskine: Also for the same reason I would like to put in evidence these three sheets of the assigned accounts receivable ledger.

Mr. Lasky: I will agree that these copies are true copies of what they purport to be, make the same objection as before, and the further objection that these things so far as I can comprehend have no relevance for the present purpose for which counsel seems to be offering them, namely bearing upon the new notes issued and taken.

The Court: They be marked and received in evidence, subject to the Plaintiff's objection, and the ruling of the Court thereon.

The Clerk: Defendant's Exhibit SS in evidence.

Mr. Erskine: I think there is only one more thing before I come to the depositions, your Honor, and that is this: that in view of the discussion that took place the other day with respect to Mr. Tobey's report and certain checks referred to therein, I would like to offer in evidence these six checks of Lofendo.

Mr. Lasky: I don't know what this is supposed to represent. Mr. Tobey's report was not offered in evidence.

Mr. Erskine: No, but I mean the discussion with respect to it and the stipulation based on it. That was discussed in chambers. [717]

The Court: Does the stipulation have any reference to these checks?

Mr. Erskine: Yes, your Honor.

Mr. Lasky: What are these checks?

Mr. Erskine: As I understand them—Mr. Tobey can correct me if I am wrong in this—those are the three checks that we originally described as the

checks lying around the bank. I think that will identify them.

Mr. Tobey: Three of them are the checks that were lying around.

Mr. Erskine: We do not stipulate; I am just using that term.

Mr. Tobey: The other three checks are the \$109,000 that was charged against the \$97,000.

Mr. Lasky: The evidence shows that on a certain date the bank honored checks for \$109,000, and on another day they honored checks for \$75,000.

Mr. Erskine: Yes.

Mr. Lasky: That is the fact. How the paper helps us, I don't know.

The Court: How are the particular checks going to help?

Mr. Erskine: I don't know if they do.

Mr. Lasky: I would suggest that Mr. Erskine and not Mr. Tobey advise us.

Mr. Erskine: It is material under one of our defenses. [718] We plead an estoppel in our counterclaim, and Mr. Tobey calls my attention to the fact that we did should show that those particular checks are payable to the United Produce Company.

The Court: You can so stipulate if that is what they do show.

Mr. Lasky: Which are the \$109,000?

Mr. Erskine: Which are the 109?

Mr. Tobey: These three are the 109 (indicating); these three are the 75 (indicating).

Mr. Lasky: All right.

Mr. Erskine: One of these is to Feldbaum.



Mr. Lasky: I know one of them is to Feldbaum. As a fact, I so stipulate, and do stipulate that each of the three checks totalling \$109,000 was a check payable to the United Produce Company, and I object to the materiality of that.

The Court: Very well.

Mr. Lasky: As for checks totalling \$75,000 which we have heretofore referred to as laying around or kicking around the branch from the 15th to the 18th of November——

Mr. Erskine: Without prejudice, your Honor.

Mr. Lasky: Without prejudice, although I think it is a very apt description, two of them were payable to United Produce Company, one was not. One was payable to another party.

The Court: Very well.

Mr. Lasky: I stipulate to the fact with the same objection. [719]

The Court: Yes.

Mr. Lasky: The one payable to the other party was for \$23,724.50.

Mr. Erskine: That is all, your Honor, except the depositions, and if I could just run through them as fast as I can, portions of them——

Mr. Lasky: Before you get into the depositions, don't you think we ought to clean up the rough draft of stipulations of Friday?

Mr. Erskine: All right, have you got an extra copy?

Mr. Lasky: No, the reporter handed me one of them, and I guess he handed you a copy.

Mr. Erskine: Let me read yours.



Mr. Lasky: All right.

Mr. Erskine: Here they are.

Mr. Lasky: I suggest that we fix them up, hand them to the reporter and have him just rough it in in corrected form.

This may go in the record: that in the stipulation where it is said that plaintiff made objections to the materiality, the Court reserved the ruling, the record should show that the statement with respect to the Court's reservation of the ruling is by the Court and not by counsel. We wouldn't want to stipulate to that.

The Court: Yes.

Mr. Erskine: Yes, certainly; that is right. [720]

Mr. Lasky: I would like to say this for the record——

Mr. Erskine: If the Court please, we are just reading that part of the stipulation with respect to the float on the checks received on accounts receivable. It says that it increased more or less steadily until November 16, 1948, and that on November 15th it was \$602,535. I would like, in order to indicate meant, I would like to state as a part of the stipulation what the float was as of, let us say October 20th, or any date in there, so as to show the amount of increase.

Mr. Lasky: We concluded after discussing it the other day that it would serve counsel's purpose by saying it increased more or less steadily. If we have to going to have the figure of October 20th—and I haven't the faintest idea of what it was on that date—then I would say we would to have it

for every day. We have got the record spread out again.

The Court: I should think so, counsel. Surely the Court understands what you are doing.

Mr. Erskine: Yes.

The Court: And what the whole picture was of this increase. Now that it amounted to any particular figure at any particular time is not of any help in deciding any of the questions, as far as I can see. I think your stipulation covers everything that is necessary, and, as counsel points out, if you pick out one day, then of course that is different than it was on any other day, so you have to show every day. [721]

Mr. Erskine: All right, your Honor.

Mr. Lasky: Then I will just hand it to the reporter.

Mr. Erskine: Have we finished reading it?

Mr. Lasky: I have, I don't know whether you have. [721-A]

Mr. Lasky: I will just hand this to the reporter. Counsel is editing his own statements there. Of course that is no concern of mine at all. I will hand this to the reporter and request that he incorporate it into the record and down to the point where the name "Mr. Erskine" appears and state that it represents a stipulation of the parties.

The Court: Very well.

Mr. Lasky: Except to the extent where it refers to the Court reserving rulings on objections, that represents the Court.

The Court: Very well.

(The following is a copy of a stipulation referred to.)

“It may be deemed that the whole of the deposition of Sam Gassman (minus the exhibits) taken in Chicago, Illinois, on behalf of the defendant on December 15, 1949, has been placed in evidence by defendant and marked Defendant’s Exhibit W in this trial.

“And with that as a predicate, we will stipulate that the paper entitled “Summary of pre-season advances and repayments as shown by cash disbursements books and by cash receipts book of the United Produce Company,” marked as Defendant’s Exhibit X in this trial, is a correct transcription of what it purports to transcribe from certain books identified in that Gassman deposition as Gassman’s exhibits 3A to 3III and 1A to 1AAA, subject to plaintiff’s objection as to its materiality, the [722] Court reserving its ruling at this point.

“It is here stipulated that the photostatic copies of the following books of United Produce Company may be marked as follows:

“Cash receipts book—Defendant’s Exhibit Y,

“Accounts receivable ledger—Defendant’s Exhibit Z,

“Cash disbursements book—Defendant’s Exhibit AA,

subject to plaintiff’s objection as to materiality and remoteness, the Court reserving its ruling at this point. It is also

“Stipulated that the five folders of documents

presented by Mr. Lasky constitute the daily remittance sheets delivered by United Produce Company to the Merchandise National Bank accompanying checks through the months of July, August, September, October and November, 1948, and subject to plaintiff's objection as to materiality and remoteness, the Court reserving the ruling thereon, may be marked as follows:

“July—Defendant's Exhibit BB,

“August—Defendant's Exhibit CC,

“September—Defendant's Exhibit DD,

“October—Defendant's Exhibit EE,

“November—Defendant's Exhibit FF.

“It is stipulated that the schedules marked Defendant's Exhibit GG, consisting of three pages are a correct transcription of certain date from certain schedules which accompanied and were a part of the interim and monthly assignments of accounts receivable made by United Produce Company [723] to Merchandise National Bank during the months of September, October, and November, 1948, Mr. Lasky stipulating to the fact but objecting to the materiality of the fact and of the schedule the Court reserving its ruling on plaintiff's objection.

“Plaintiff's Exhibit 6 is typical of the form of monthly assignments referred to in the foregoing stipulation and referred to Defendant's Exhibit GG.

“It is stipulated that beginning on or about the 29th of October, 1948, the amount of float with respect to checks of Lofendo drawn on the East Bakersfield branch remitted to plaintiff bank by

United Produce Company on the assigned accounts receivable operations began to increase, and increased more or less steadily until November 16th, 1948, and that on November 15th it was \$602,535.61. This float is calculated on the basis of checks not in fact then yet collected of which amount \$583,743.15 were never good.

“Float” in banking parlance means the dollar amount of checks upon which a bank gives conditional credit during the period of time that they are not yet actually collected, with this exception: That when they are sent through for collection on a cash letter, they are assumed to be paid after a given period of time, and that in the case of checks which Merchandise National Bank sent by cash letter to the East Bakersfield branch of the Bank of America for payment, the period of time for this purpose was [724] treated by Merchandise National Bank as four days.

“Mr. Erskine: I would like to state this for the record: It has been suggested by the defendant from time to time during the discussions of this afternoon that it produce summaries of the data shown by the exhibits which have been introduced in evidence, but the suggestion was then made that what would be shown by such summaries appears in the exhibits already in evidence, and that therefore there is not need of introducing such summaries in evidence, and that the defendant in its argument could use any summaries it saw fit based on such exhibits.

“Mr. Erskine: I will ask that the paper that I am now handing to the Clerk to be marked as

Defendant's Exhibit C-1, the paper being the sheets of the Lofendo account with the East Bakersfield branch from the date upon which the account was opened to the date shown on the last two ledger sheets of the account already introduced in evidence.

“(The document referred to was thereupon received in evidence and marked Defendant's Exhibit C-1.)”

Mr. Erskine: That leaves us nothing but the depositions, your Honor. Shall I try to proceed with them?

The Court: You are referring now to Mr. Messenger's deposition, the parts that you want to introduce? [725]

Mr. Erskine: Yes, your Honor.

The Court: If you have a list of them, all you have to do is to read the list.

Mr. Erskine: I can read the pages. I have tried to eliminate as much as I possibly could in view of the stipulations and in view of the exhibits that have already gone into evidence, I could read the pages.

The Court: Yes, just read the pages and they will be taken down by the reporter.

Mr. Lasky: Of course it makes it exceedingly difficult for me to know whether I should make an objection to parts as they come in. I think the only thing I can do under the circumstances is to object to all parts as being immaterial.

The Court: They will all go in under your general objections on the whole matter, Mr. Lasky.

Mr. Erskine: Then I offer in evidence the following pages of the Messenger deposition.

I would like to be somewhat clear as to the mechanics. I take it that the reporter will copy the pages of the Messenger deposition which I am about to cite in the record.

The Court: Into the record, yes.

Mr. Lasky: Of course that is all right. I merely want to state that I don't want a daily transcript of this portion written up and delivered to us.

Mr. Erskine: Neither do I. That can be prepared later. [726]

The Court: Very well.

Mr. Erskine: The pages to which I refer are:

Pages 63 to and including 65;

Pages 74 to and including 75;

Pages 77 to and including 78;

Pages 249 to and including 252.

Mr. Lasky: That was all discussed between counsel.

Mr. Erskine: Yes, I take that out. Take that out. Page 277 to page 293.

And I would like to have marked as an exhibit the exhibit that was marked upon the taking of the Messenger deposition Exhibit 25.

Mr. Lasky: We discussed that in chambers, when we drew up the long stipulation and it was agreed that you didn't need it because it referred to the procedure of handling loans and that would cover it.

The Court: That is right. I don't know as we agreed we didn't need it. It is already covered.

Mr. Erskine: Part of it is covered. The part



relating to the loan is covered, but the balance isn't.

Mr. Lasky: What is the balance of it?

Mr. Erskine: It might be material. It relates——

The Court: I know. If it just might be, can't we eliminate it, Mr. Erskine. We started out pretty good there but we were going to eliminate all these records. It is piling up, piling up [727] now to much more than was ever necessary.

Mr. Lasky: I think so.

The Court: Unless you have something definite in view with it, let's eliminate it. Just because it might be of some value—the matter is covered generally.

Mr. Erskine: It shows the relationship——

The Court: That is no contest.

Mr. Erskine: Counsel has introduced evidence to show the relationship between the bank, the contractual relationship between the bank and the United Produce Company. This exhibit 25 is an outline of how the account is to be handled.

Mr. Lasky: Drawn up in 1945. Now we have a stipulation as to how it was handled.

The Court: How it was actually handled. How would that help us.

Mr. Lasky: That memorandum was not a memorandum between the parties binding as to how the bank was to go ahead. We have stipulated how in fact the parties proceeded.

The Court: That is what governs the legal relationship, isn't it, is how they actually handled the account?

Mr. Erskine: On one phase of the matter we

have agreed on that, your Honor, but the exhibit relates to other phases of that relationship. I would like to consider the point, and if possible I will forget about it.

The Court: Very well. [728]

Mr. Erskine: That takes us to 293. Well, no, I want 293 to and including 295.

Mr. Lasky: That is just a discussion on that memorandum. I don't think it is evidence; I think it is just a question between counsel.

Mr. Erskine: It says that there was no written modification of it but there were mutual changes in it. The limit was increased from 175 to \$200,000.

Mr. Lasky: It would serve no purpose because we have already stipulated to that.

Mr. Erskine: But you see, Mr. Lasky, that memorandum relates to the amount of the line of credit and described it all. Counsel was very meticulous in putting into evidence the papers which he says represented contractual relationship between the bank and the United Produce Company. This is one of the important papers relating to that subject, your Honor, and I would like to have it in.

The Court: Very well.

Mr. Lasky: A line of credit is merely a statement by the bank that it has in mind advancing so much money; but in this case we have agreed and I have agreed just half an hour ago to the \$200,000, so the fact that they were going to do it is immaterial.

Mr. Erskine: But you put in papers relating to the contract between the bank and United. I know

you are going to discuss that in argument and I would like to have this in. [729]

The Court: Very well, put it in.

Mr. Erskine: I said 293 to and including 295.

The Court: That exhibit is Defendant's Exhibit TT in evidence.

Mr. Lasky: Did I understand that memorandum is now coming in?

Mr. Erskine: Yes.

316 to 318.

Mr. Lasky: 316 to 318 again is discussion between counsel, not evidence. You can't offer discussion between counsel.

Mr. Erskine: There evidently was something in there that I wanted in the way of evidence. I know that discussions between counsel is not evidence. Yes, I would like to have that in there. There is quite a bit more than discussion between counsel.

320 to and including 341;

362 to and including 363;

367;

370, together with the others, reports which are marked Exhibit 49 and following, on the Messenger deposition. I would like to have those marked. They relate not so much to this as to Tague's testimony.

Mr. Lasky: You mean they were the reports the field officer turned in?

Mr. Erskine: Yes. [730]

Mr. Lasky: Throughout the year 1948?

Mr. Erskine: No, not throughout the year; during the last few months. It may have been throughout the year; I don't know which it was.

Mr. Lasky: Again I object to the materiality of

these auditors reports. I am just completely lost on this materiality; it has gotten so far afield that it is hard to frame an objection any more.

Mr. Erskine: Your Honor, it is our contention that the auditor was negligent.

The Court: I am not going to take a stand at this point that would in any way make Mr. Erskine's case incomplete from his theory of the matter. As you of course have observed, I am putting in anything and everything he wishes to put in, subject to your objection as to its materiality, of course. I don't know; I don't follow its materiality, but counsel will on his memorandum point out its materiality.

Mr. Lasky: I will try to restrain myself from repeating these objections.

The Court: Yes; all of these go in subject to your objection as to materialities.

Mr. Erskine: I ask that that be marked Defendant's next in order, those audit reports.

The Clerk: This is Defendant's Exhibit UU in evidence.

Mr. Erskine: 371 to and including 372; [731] 385 to and including 415.

Mr. Lasky: Pardon me a moment. As I read this, this covers the sort of thing we went through in chambers on that long stipulation of the account. You are developing through the witness what we later stipulated to, thirty pages.

Mr. Erskine: I think I would like to have it in. I don't see that it can do any harm. At least I did when I read the deposition.

The Court: It isn't going to change the stipulation.

Mr. Erskine: No, your Honor, no, no, I am not; the stipulation controls whatever that says.

Mr. Lasky: I understand that counsel properly went through these depositions and marked the parts before the trial opened.

Mr. Erskine: I have been over them since then. I went over them yesterday.

The Court: Very well; proceed.

Mr. Erskine: Pages 424 to and including 426; 460——

Mr. Lasky: 424 to 426 is the part where for the first time the Plaintiff's Capital Stock and surplus is stated.

Mr. Erskine: Yes, that is right.

Mr. Lasky: That of course relates to your point about the excess loans in violation of the bank law. [732]

Mr. Erskine: Yes.

Mr. Lasky: I wanted to make sure of the point.

The Court: You object specifically?

Mr. Lasky: Yes.

The Court: And the objection is taken from the advisement by the Court and ruling reserved on it.

Mr. Erskine: 460 to 465.

There was a stipulation between us, Mr. Lasky——

Mr. Lasky: Pardon me?

Mr. Erskine: There was a stipulation between us with respect to the Bankruptcy claim. In introducing part of the Reichwine deposition, I will want to use two or three of the exhibits that are in the

Bankruptcy claim, and we stipulated back in Chicago that the photostats could be used in place of the originals.

Mr. Lasky: Reference here of course is to the claim which the Merchandise National Bank filed with the Trustee in Bankruptcy of United Produce Company. Counsel brought it out and we did stipulate and I stipulate again, that all photostatic copies attached as exhibits to that document may be deemed as originals and used as such for all purposes of the case. I so stipulate.

Mr. Erskine: Page 475, and I would like to introduce Exhibit 64, which is the report of overdrafts.

The Court: Isn't that all in here now, or is it just a [733] summary?

Mr. Erskine: No, it is just a formal report.

Mr. Lasky: Is it just nothing.

Mr. Erskine: It was a formal report that was explained in the depositions. It relates to the overdrafts on the amount.

Mr. Lasky: It isn't even that, counsel.

Mr. Erskine: Well, the form, taken with the deposition, explains how a report was made to the bank officers, with respect to overdrafts whenever the overdrafts appeared, and how often the overdrafts appeared in a particular account.

Mr. Lasky: It is a form by which at the end of the day the bank got the report as to any apparent noonday overdrafts, how they were handled, whether there were other items coming in throughout the day which showed that there wasn't an over-

draft. This was just a form used by the bank for that purpose. [734]

The Court: What is the purpose of it?

Mr. Erskine: The purpose of it is to show that there were many noonday overdrafts in this account.

The Court: That appears from the evidence already.

Mr. Erskine: Whenever that noonday draft so appeared, a report to that effect was made to the bank officer, together with the checks creating the overdraft, and calling his attention, according to our point of view, to the situation in the account.

The Court: They knew about the account. If the bank's records show it, it is knowledge to the bank.

Mr. Erskine: Let's forget about that then.

The Court: Gentlemen, I am sorry I have to leave at this point. I have an appointment. I would like to continue right straight through and see how much we can eliminate or get settled.

Mr. Erskine: Yes.

The Court: The Court will stand in recess until two o'clock.

You had better make arrangements to have the Court meet in some other courtroom; they want to use this room starting at three o'clock.

Mr. Erskine: We will be through.

Mr. Lasky: I am not so sure.

The Court: I am not so sure. [735]

Mr. Lasky: I have a very short rebuttal. It all takes a little time.

The Court: You can make arrangements for us



to use another courtroom at two o'clock. Counsel can check with the Clerk's office to find out which one.

(Thereupon a recess was taken until two o'clock p.m.) [736]

Monday, June 26, 1950, at 2 P.M.

Mr. Erskine: Now the next pages of this Messenger deposition which I would like to offer are pages 497 to and including 499. Then page 530——

Mr. Lasky: Just a little more slowly.

Mr. Erskine: Then pages—ready?

Mr. Lasky: All right.

Mr. Erskine: Then pages 530 to 537. Then pages 541 to 545. Exhibit 11, or the checks marked for identification as Exhibit 11 on the Messenger deposition are the same checks as were marked Plaintiff's Exhibit 4 for identification in the trial.

Mr. Lasky: That is right.

The Court: Very well.

Mr. Erskine: Then pages 546 to and including 549. Then there was a stipulation, Mr. Lasky, between us back in Chicago with respect to the form of the note. I don't know that that is necessary, but——

Mr. Lasky: The note?

Mr. Erskine: You remember.

Mr. Lasky: I think I put that in earlier, in my case.

Mr. Erskine: Yes, you put that in. I don't think it is necessary.

Mr. Lasky: It isn't necessary to put it in [737] again.

Mr. Erskine: Well, no. There was a stipulation between us back in Chicago with respect to the form of the note, if you remember, and then later on you wanted to modify that stipulation with respect to the form of the note, and the modification appears here in 565 to 572. But I don't believe it is important.

Mr. Lasky: Oh, on that part of it, I had copied out that and it is in one of my exhibits.

The Court: It is part of the exhibit that is in evidence?

Mr. Erskine: Oh, I see, I see. I didn't realize that.

Mr. Lasky: It is already in.

Mr. Erskine: Then pages 573 to and including 574; 585 to and including 588.

Mr. Lasky: Well, now, 573 to 574 concerns Mr. Messenger's state of mind.

Mr. Erskine: Well, let me look at it. Perhaps I can pick it out. Yes. Well, I will take that out.

The Court: All right.

Mr. Erskine: Then the last is from 585 to and including 588. And if I should have left out the word "including" when referring to the last page, I want it understood that in saying what I did, I meant "including" when referring to the last page of each one of these citations.

The Court: Very well.

Mr. Erskine: And now going to the Collins

deposition, your [738] Honor, I would like to offer in evidence pages 3 to 15 of that deposition.

Mr. Lasky: Will you pardon me while I get Collins before me? Well, without repeating the general objection, on page 14 the witness was asked whether he talked to any other officer of the bank. He said, "Oh, I am quite sure that I did." And then he went on to say, "A thing like that was almost bound to be a matter of somewhat general discussion," and that part I move to strike. He goes on to say, "I know that a thing like that was almost bound to be a matter of somewhat general discussion among the officers who would be working in any manner on the account or servicing it in any manner. I know that at that time that was first called to Mr. Redheffer's attention by Mr. LeRoy and myself. He called Mr. Rudolph in and I think Mr. Rhodes, and there was a general discussion." None of that is responsive to the question and none of it is within his knowledge. I think that should go out.

Mr. Erskine: I can't agree, your Honor, as to this question of whether or not Collins had called it to the attention of the officers of the bank, the fact that a kite might be going on.

The Court: Well, his answer then is just, "Well, it must have been because it must have been a matter of general discussion," or words to that effect.

Mr. Lasky: Yes. I mean, he says, "I am quite sure that [739] I did." I don't move to strike that out. That is responsive. But the rest of the answer, which goes over to the top of page 15, I do move to strike, because that is his speculation, that a thing

like that would have been bound to have been discussed.

The Court: Yes.

Mr. Erskine: Well, the language, "A thing like that was almost bound to be a matter of somewhat general discussion among the officers who were working in any manner on the account or servicing it in any manner"; I agree that that should go out.

The Court: Very well, that motion may be granted, that portion may be stricken.

Mr. Lasky: All right.

Mr. Erskine: Now we come to the Reichwine deposition.

Mr. Lasky: Well, before you get further than Collins, I offer part of the cross-examination of Collins. I do so only because the rest of it has come in. I offer his cross-examination, pages 33, line 6, to page 35, line 2; page 41, line 15, to page 42, line 19; page 44, the last two lines, to and including the 9th line on page 45; page 48, lines 3 to 16; page 56, beginning at the second line from the bottom, to page 58, the next to the last line from the bottom.

The Court: Very well.

Mr. Erskine: Now we come to the Reichwine deposition, your Honor, and I would like to offer pages 3 to and including [740] 18.

Mr. Lasky: Will you take this a little slowly for me?

Mr. Erskine: Yes.

The Court: Three to and including 18.

Mr. Erskine: Yes, your Honor.

Mr. Lasky: Now, just a moment, please. I am

not going to repeat the general objection, but there may be specific matters. On page 13, which is part of what you just offered, and over on page 14, is a series of questions whether the line of credit being extended to United Produce Company was as large as any line of credit extended to any other customers. I object to that. That is particularly immaterial.

Mr. Erskine: Well, I will agree that may go out.

The Court: That portion may be stricken.

Mr. Erskine: Then pages 18 to and including 20. Now in that discussion, or in that testimony, your Honor, there was a reference to certain delivery orders and drafts and invoices attached to the bankruptcy claim, and I would like to suggest that we have one of those, as an exemplar, marked as an exhibit.

(Document examined by Mr. Lasky.)

Mr. Erskine: I will ask for a stipulation that—Would you mark that, Mr. Clerk, first, please? Mark it for identification.

The Clerk: This will be defendant's Exhibit next in order, Defendant's Exhibit VV for identification. [741]

(Exemplar of documents attached to bankruptcy claim, referred to above, was marked Defendant's Exhibit VV for identification only.)

Mr. Erskine: We ask it be marked in evidence. I think I am going to try to put it in evidence, and I don't think there will be any objection.

Mr. Lasky: Well, there will be, of course.

Mr. Erskine: Well, subject to your general objection. It will be stipulated, Mr. Lasky, that the drafts discounted by the United Produce Company with the Merchandise Bank were in the form of the drafts on this Exhibit VV, and that the form of delivery order and invoice accompanying drafts discounted by United Produce Company with the Merchandise Bank were in the forms of the delivery order and the invoice on this exhibit.

Mr. Lasky: It will be stipulated that the various drafts were in the general form of the draft here photostated, that each such draft when brought to the bank and discounted was accompanied by an invoice purporting to cover certain sales and carloads and railroad cars of goods. The invoice being in the general form here set forth. And it was also accompanied by certain delivery order in the form set forth herein. That is the fact; I object to the whole thing as immaterial. This bears upon the question of excess loan limits.

The Court: Very well, it is admitted subject to the ruling of the Court on plaintiff's [742] objection.

The Clerk: Defendant's VV.

(Whereupon Defendant's Exhibit VV for identification only was received in evidence.)

Mr. Erskine: Then on pages 38 to 41 of this deposition is set out the stipulation with regard to what constitutes noonday balance, and I would like to have that copied into the record as a stipulation in the case.

Mr. Lasky: Well, if it goes in one way, it doesn't need to go in another way.

Mr. Erskine: Well, all right.

Mr. Lasky: We will stipulate to it.

Mr. Erskine: Then it is stipulated on the trial as well as on the taking of the deposition? I assume that if you stipulate to it upon taking of the deposition, it will probably be stipulated to on the trial.

Mr. Lasky: Yes, of course.

Mr. Erskine: Yes, all right. Then we will say pages 38 to and including 41 of the deposition.

Mr. Lasky: You will find that that stipulation was supplemented in the record a little later.

Mr. Erskine: Yes. And in connection with that same stipulation, your Honor, I want pages 49 to and including 54.

Mr. Lasky: I think you had better start on page 47.

Mr. Erskine: Forty-seven? All right; 47 to and including 54. [743]

The Court: That is also part of the stipulation?

Mr. Lasky: Yes, part of the same stipulation.

The Court: Very well.

Mr. Erskine: Part of the same stipulation. Then to go along, here——

Mr. Lasky: Stipulation subject to my same general running objection.

The Court: Yes.

Mr. Erskine: Page 56—pages 60 to 66. If I go too fast, let me know, will you, Mr. Lasky?

Pages 91 to 94—to and including in each case. Page 101, page 106 to 107, page 156 to and including——

Mr. Lasky: Pardon me a moment. Go ahead.



Mr. Erskine: Pages 156 to and including 161.

Mr. Lasky: What page, please?

Mr. Erskine: 158 to and including 161.

Mr. Lasky: I think you will find that has already been all covered by stipulation entered into in this case.

Mr. Erskine: Let me see.

Mr. Lasky: For instance, your first question there (reading); we covered that by a stipulation this morning. That has all been covered.

Mr. Erskine: Well, I want to get in there that it was on the same day and so forth, that additional accounts receivable would be issued. It was just three pages, and I don't [744] think it will do any harm.

The Court: Very well.

Mr. Erskine: Page 158 to and including 161, pages 166 to and including 171, page 177 to and including 178, page 181 to and including 193.

Mr. Lasky: Just a moment, please. My notes on this indicate it has already been covered by stipulation, or at least in conversation between counsel. One eighty-four in the wire of October 20th from Merchandise National Bank to Bank of America.

Mr. Erskine: Well, I want to show that it was Reichwine who sent that wire and that he was thoroughly familiar——

The Court: His name is signed to it, isn't it, and it is evidence?

Mr. Erskine: That is right.

The Court: There is not other contest on the matter?

Mr. Erskine: And the fact that when he referred to the letter for full information, it was the letter of September the 22nd that was presented to him.

Mr. Lasky: No, he said he didn't know anything about that letter. That is, unless I made a mistake.

Mr. Erskine: Yes, you are mistaken about that, because here is the question:

“Well, I call your attention to the fact that I was in error in putting the question to you. Defendant's Exhibit 2 states this. ‘Suggest you contact your main branch at Fresno, California, who have complete [745] ‘Information,’ I will ask you, Mr. Reichwine, when you stated that in Defendant's Exhibit 2, did you have reference to Defendant's Exhibit No. 3?’

“Yes, sir.”

Mr. Lasky: Where are you reading from?

Mr. Erskine: That is page 183 to 184.

Mr. Lasky: All right.

Mr. Erskine: Now, that reminds me, your Honor, that I would like to have those pages in, 181 to and including 193. Now——

Mr. Lasky: 186 to 193—or rather, 186 to 188 is just conversation between the attorneys.

Mr. Erskine: Oh, yes. Let's take that out. Let's say 181 to and including 186. I am not trying to cover lines in here. And then 188 to and including 193.

Now, your Honor, I take it, Mr. Lasky, that it will be stipulated that Exhibit 2 on the taking of

Reichwine's deposition was the wire of October the 20th? I don't know the number of it, but I think that was sufficiently identified—from Merchandise to the East Bakersfield branch of the Bank of America. And that No. 3 upon the taking of Reichwine's deposition was the letter of September 22nd, addressed by Merchandise Bank to the Fresno branch of the Bank of America?

Mr. Lasky: Yes.

The Court: Very well. [746]

Mr. Lasky: No, Mr. Erskine, from page 188 on to 193 is primarily discussion between you and me.

Mr. Erskine: 188 to 193—well, it does relate in my opinion, Mr. Lasky—I agree with you that page 190 can go out. That is all discussion.

The Court: Well, as a matter of fact, anything in the record, anything in the reported conversations or statements by either one of you can go out.

Mr. Erskine: Yes, that is right, your Honor.

The Court: Because certainly it is not evidence.

Mr. Lasky: It is not evidence of anything.

Mr. Erskine: And 191 can go out. But 192 to 193 I want in. Then the next citation is 204 to and including 209.

Mr. Lasky: Just a moment, please. All right.

Mr. Erskine: Then the next is page 222 to and including 229. And the next—you want to give me the high sign before I go on, Mr. Lasky?

Mr. Lasky: Go ahead.

Mr. Erskine: The next is 236 to 241. Next is 265, next is 271 to and including, or I should have said that in each instance, 272. The next is 276 to and

including 281. Next is 283. Next is 287 to and including 290. Next is 303 to and including 307. Next is 316 to and including 320. Next is 323 to and including 328. And the next is 329 to and including 331. Next is 335 to and including 336, and that is all for [747] Reichwine.

Mr. Lasky: I think it will be found that practically all of that is what I would call padded—discussions on matters already stipulated to and so forth. I didn't state my general objection, which I assume goes. I want to offer other parts of the deposition, without waiving my objection to any of it.

The Court: Yes.

Mr. Lasky: That is as follows: Page 85, fourth line from the bottom to the bottom of page 86; page 177, line 10 to line 15; page 214, line 22 through page 216; page 298, line 12 to and including line 20; page 311, line 7, to page 312, line 3; page 315, tenth line from the bottom through page 316.

I believe Mr. Erskine offered page 316 and following, did you not?

Mr. Erskine: My book there will show it. Pardon me. 316 to 320.

Mr. Lasky: All right. Page 321 to page 323. That is to say, to the end of this cross-examination on page 323. Then page 336, page 337. Also at this time I wish to offer in evidence the exhibit that was marked 5-B on Mr. Reichwine's deposition. Now there is a stipulation in the record on that matter. At page 33 it appears. I think I can briefly summarize it. Exhibit 5-B is part of the Merchandise

National Bank's outgoing collection forms. In other words, when they sent a draft out somewhere else for collection, they used these forms, [748] and 5-B is the form that accompanied the draft itself. Will you so stipulate?

Mr. Erskine: Yes, I will agree.

The Court: Very well.

Mr. Erskine: No objection.

The Court: Very well.

Mr. Lasky: I merely want to call attention to the fact that this collection letter has on it the instructions to deliver documents only on payment.

The Court: It will be received.

The Clerk: This is plaintiff's exhibit No. 32 in evidence.

(Whereupon collection letter referred to above was received in evidence and marked Plaintiff's Exhibit No. 32.)

Mr. Erskine: Then coming to the Tague deposition, your Honor, I would like to offer pages 4 to and including 5; pages 11 to and including 19; or to and including 18—I am sorry, I misread that. Then pages 21 to and including 34, pages 37 to and including 48, and I would like to have it agreed that the exhibit Defendant's Exhibit TT that was offered this morning is the same exhibit as Defendant's Exhibit 49-A to 49-G for identification on the taking of the Messenger deposition.

Mr. Lasky: Let me look at it (examining); all right.

The Court: Very well.

Mr. Erskine: And pages 49 to and including 60.

Mr. Lasky: Are you sure that is TT? Shouldn't it be UU? [749]

The Clerk: He had picked up both of them by error.

Mr. Erskine: Oh, I am sorry.

The Clerk: This is TT here (indicating).

Mr. Erskine: I am sorry.

The Court: Picked up both of them by error.

Mr. Erskine: The exhibit was UU and not TT.

The Court: Very well.

Mr. Erskine: Thank you, Mr. Lasky. Then 64 to and including 66, 68, and 74 to and including 75. That is all.

Mr. Lasky: You offered all of page 68?

Mr. Erskine: Yes, all of page 68.

Mr. Lasky: Without waiving my objection to any parts of Mr. Tague's deposition, and merely because it is being received subject to the objection, I wish to offer his cross-examination page 60 to line 10 on page 64, and also pages 69 and 70.

The Court: Very well.

Mr. Erskine: Now I want to offer just two sections of Royds' deposition. I would like to offer pages 4 to and including 18. There is a reference on page 9 to defendant's exhibit 44 in the Messenger deposition, the remittance sheets. I will ask that it be stipulated that that reference——

Mr. Lasky: The reference is 41, isn't it?

Mr. Erskine: Oh, 41. Yes, pardon me. Forty-one is the remittance sheet. I will ask that it be stipulated that that reference is to the remittance

sheets, and the form of those [750] introduced on the trial and marked Defendant's Exhibit BB.

Mr. Lasky: All right.

The Court: Very well.

Mr. Erskine: And then pages 24 to and including 32 of the Royds' deposition. That is all.

Mr. Lasky: Well, I have my objection, but I have nothing further to offer out of that.

The Court: Very well.

Mr. Erskine: Now just one other thing, your Honor. Mr. Tobey called to my attention with respect to what we discussed this morning, the following. Your Honor will recall that I attempted to state the evidence, what he would say, to show that the Lofendo checks credited to the account of the Merchandise Bank were the same checks as those listed on one of the exhibits that was discussed, this morning, and he called to my attention during the noon hour this fact, that the credit to the Lofendo account in the Bakersfield branch—I have got it mixed up. I will start again. I am sorry. [751]

I attempted to state this morning the basis upon which Mr. Tobey would testify that the debits to the United Produce Company account with Merchandise Bank, which he says were checks drawn by it to the order of Lofendo, were such checks. Now he suggested I supplement what I said in that connection with the following: The credit to the Lofendo account in the East Bakersfield branch is one total; that is the checks drawn by United Produce Company to the order of Lofendo which were credited to defendant's account at East Bakersfield



and charged against defendant's account in the Merchandise Bank. The debits to the United Produce account consisted, however, of several checks which were one total so far as the credit was concerned at East Bakersfield.

In order to show that the debits to the Merchandise account on one day are the same items as the credit to the Lofendo account on the corresponding day, we would like to introduce the deposit tags showing the deposits to the Lofendo account in the East Bakersfield branch. So we ask that those deposit tags be marked as our exhibit.

Mr. Lasky: That is, right from the beginning?

Mr. Erskine: When do they begin?

Mr. Tobey: From July 1st.

Mr. Erskine: July 1st.

The Clerk: This is defendant's exhibit WW.

Mr. Erskine: Then I would like to also say that Mr. Tobey, [752] in making the study upon which he would have testified has stated this morning, also compared the debits charged against the United account; that is, the debits of the Lofendo checks charged against the United account, with the Gassman list of checks drawn by the United Produce Company on its account on the Merchandise to the order of Lofendo.

Mr. Lasky: That is just argument.

Mr. Erskine: Well, it is just an additional basis upon which the study was made.

And then, if your Honor please, I feel that my statement of the basis of Mr. Tobey's study that I made this morning might not have been as accurate

as I would like to have it, and if I find that there are any faults with it upon reading the transcript, I would like, when the case is argued on Thursday, to call those to the Court's attention if I find any.

And with that the defendant rests.

Mr. Lasky: By way of rebuttal——

Mr. Erskine: Just one second.

Mr. Lasky: I don't understand that counsel reserves the right to offer more evidence on Thursday.

Mr. Erskine: No.

Mr. Lasky: When we are through today we are through.

Mr. Erskine: I am through; I would just like to check what I said this morning in order to determine that it is an accurate statement. [753]

I neglected to say this, your Honor; in Mr. Royds' deposition, the questions put to Mr. Royds upon that deposition referred to an exhibit marked for identification upon the taking of the Messenger deposition as 29 PP, and this is a photostat copy of it. In order to make clear the things Mr. Royds is testifying to, I would like to introduce that exhibit.

Mr. Lasky: You mean to make it clear what he said he knew nothing about? Isn't it sufficient to say that it is one of the what has been called interim assignments and schedules attached?

Mr. Erskine: Well, that has reference to several Lofendo accounts.

Mr. Lasky: All right.

The Court: Very well.

Mr. Tobey: I was instructed to check this morn-

ing during the Court, and I have done it, the checks on the East Bakersfield account against this list. I went over it. I was asked to do it this morning, and I checked it.

Mr. Erskine: What is the result of that check?

Mr. Tobey: I find that every check charged to the Lofendo account during the month of November is listed in the Gassman list.

Mr. Erskine: Yes.

Mr. Lasky: Just a moment. What is going on?

Mr. Tobey: I was instructed to check these. [754]

Mr. Lasky: What I said was that if Mr. Tobey assured me on the side that something was so, I would so stipulate.

The Court: You would so testify?

Mr. Tobey: I have done it.

Mr. Erskine: He has done it now. In other words, before coming to this other exhibit, as I understand the situation, Mr. Lasky stated that if Mr. Tobey would check the checks drawn by Lofendo during the month of—what was it, October?

Mr. Tobey: From October 25 to November 19.

Mr. Erskine: The checks paid or charged to that Lofendo account at the East Bakersfield branch from October 25 to and including all the checks charged against the account during November, against the Gassman list for the purpose of determining further——

Mr. Lasky: You are off on the wrong foot, Mr. Erskine. I wasn't interested in anybody checking anything against the Gassman list. You had a photo-

static copy of the United Produce Company ledger sheet at the Merchandise Bank on which Mr. Tobey had run some red lines. I merely said that you did not have items to check against that. You said you did. I said to check this, not against the Gassman list——

The Court: You have already agreed as to what Mr. Tobey would testify to with reference to that.

Mr. Lasky: Yes.

Mr. Erskine: You suggested that I put a bracket on that [755] exhibit which would comprise the checks that we had. That is what you asked me to do.

The Court: Yes.

Mr. Erskine: Did you do that, Mr. Tobey?

Mr. Tobey: No, they weren't all together, so I indicated it by putting a red line.

Mr. Erskine: I will get the exhibit.

Mr. Tobey: It is here; I used this one.

Mr. Erskine: Let me see that exhibit.

There it is. Mr. Lasky stated this morning, as I understood him, that if you put a bracket on this Defendant's Exhibit OO to indicate which of the checks there were Lofendo checks of which we had the originals, he would so agree. Now while you are doing that, Mr. Tobey, in order to wind the thing up, I would like to ask that this exhibit that I referred to which was mentioned in the Royds' deposition, which was marked at the time of the Chicago depositions as Messenger's 29-PP for identification, be admitted as defendant's exhibit next in order.

The Court: It may be admitted, subject to the plaintiff's objection, and a reserved ruling.

The Clerk: It is defendant's XX in evidence.

Mr. Erskine: As soon as that check is made by Mr. Tobey, that is our case.

Mr. Lasky: Can I take that assurance and commence offering my rebuttal? [756]

Mr. Erskine: Yes, that is right.

Mr. Lasky: First, as part of the plaintiff's rebuttal, I offer out of the deposition of Raymond L. Redheffer page 10, beginning line 17 through page 12, line 10.

Mr. Erskine: Pardon me; will you say that again?

Mr. Lasky: Beginning on line 17, page 10, through line 10, on page 12. And I will stipulate that it is no more material than your defense.

Mr. Erskine: That is all right.

Mr. Lasky: You have nothing to offer out of this?

Mr. Erskine: No.

Mr. Lasky: Then, Mr. Erskine, I have here the statement we prepared, and which has been checked through by Mr. Tobey with Mr. Messenger, entitled "The Lofendo account at the Bank of America N.T. & S.A., East Bakersfield branch, Tabulation showing Days on Which Payments were Made Against Uncollected Funds, the Amount Thereof, and Days on Which the Account Had a Collected Balance." May we stipulate that it correctly states the fact?

Mr. Erskine: Mr. Tobey tells me he made a check

of it. Are there any discrepancies between these two?

Mr. Tobey: When I was checking with Messenger we had the original lists and we agreed on the float deduction. This is on the actual payment dates of the items.

Mr. Lasky: No; we have done it here, and let me add [757] further, this goes upon the basis of three days for the float, because we were assured the other day by counsel that the Bank of America East Bakersfield branch actually assumed three days.

Mr. Erskine: That was incorrect.

Mr. Lasky: That was incorrect?

Mr. Erskine: That was incorrect. According to what Mr. Tobey now tells me, our instructions on such items were two days.

Mr. Tobey: Good on the third day.

Mr. Erskine: Good on the third day. Do you want to see the regulations? We have got them here to show you.

Mr. Lasky: Will you pardon me just a moment?

The Court: Yes.

Mr. Lasky: Because I have been somewhat misled by the previous information.

The Court: Mr. Lasky, is the information there taken from the records that are in evidence?

Mr. Lasky: I would have to check this. This actually was taken from the Lofendo account. Will you pardon me a moment and I will ascertain.

The Court: Surely.

Mr. Lasky: I apparently misstated what this was. This doesn't show any artificial period or

assumed period as to the float. This is the actuality as to the period of time in which checks were uncollected at the Bank of America, during [758] which time they were paying out against them. Upon that basis I would ask a stipulation that this is true. This was checked with Mr. Tobey, and I would like to offer it on that basis.

Mr. Erskine: The objection to it from our point of view, as I understand it, is that it might represent what happened in Chicago with respect to the actual books of the Merchandise Bank, but, as Mr. Lasky pointed out the other day, we don't know anything about those books.

Mr. Lasky: Ah, but we do.

Mr. Erskine: Wait a minute. Now in determining the float, or determining how long the East Bakersfield branch should give those checks to clear, all that the men in the branch did was to consider the directions which they had received from the bank itself as to how long a check received by them for deposit drawn on a Chicago bank would take to clear, and upon the basis of that direction the account was handled by the officers down there. Now the fact that the checks were not actually paid until after the period allowed for the checks to clear is, from our point of view, we believe, immaterial.

Mr. Lasky: There is a complete difference between the two situations. Counsel is trying to show something about uncollected funds at our bank, for the purpose of demonstrating, I assume, negligence on our part. We couldn't be negligent if we did not act upon information which was not accessible to



us. I considered the whole subject immaterial, but in response, I [759] offer this to show not negligence, but that there was no proximate casual relationship. When we are dealing with proximate casual relationship we are dealing with actualities and not assumptions.

The Court: You may make your objection and I will admit the document but reserve my ruling on your objection. But will you stipulate that the document reflects the records of the bank and the transactions as they occurred?

Mr. Erskine: Would you pardon me just one second?

The Court: We are not interested in rules now; we just want to know whether this reflects a true situation as matter of fact; not with reference to the rules or what you knew. For the time being it is being admitted subject to your objection. Now as to whether or not the fact that you did not know about how it was handled but that you actually did, if that is what happened, if you actually followed the rules rather than did not know of it—

Mr. Erskine: I think we would agree with it provided we could supplement it by data with respect to what the situation would be upon the basis of what the men in the Bakersfield branch did with respect to holding the checks for clearing. If they were directed that checks drawn on Chicago should be held for two days and should be deemed good on the third, if those were their instructions, then I want to show that. [760]

Mr. Lasky: Counsel, may I say this: when you bring up the two-day thing, you could lead to much further discussion, because I can pick out from Mr. Tarr's deposition wherein Mr. Tarr testified that they always proceeded on the three-day basis, and that is where the three days came from, and your own man assumed that.

The Court: I thought it was stipulated in chambers one day that it was a three-day basis.

Mr. Erskine: I don't remember that.

The Court: It occurs to me, now I don't know——

Mr. Lasky: I remember that distinctly.

The Court: I would have to check the record. I know that the matter was brought up in chambers, and that you then stated that it was handled, and Mr. Tobey did, that it was handled upon a three-day basis.

Mr. Lasky: All I want, counsel, is a stipulation that this is what it purports to be, now if you won't stipulate, I can call Mr. Messenger on the stand and take about two minutes.

The Court: Call him on the stand and let's get it over with.

Mr. Lasky: Take the stand, Mr. Messenger.

#### FREDERICK C. MESSENGER

recalled on behalf of the plaintiff in rebuttal, previously sworn.

Mr. Lasky: Mr. Messenger has already been sworn.

The Court: Yes. [761]

(Testimony of Frederick C. Messenger.)

Direct Examination

By Mr. Lasky:

Q. Did you make a study of records to determine with respect to the Lofendo account at the Bank of America National Trust and Savings Association, at East Bakersfield, from September 25, 1948, through November 17, 1948, whether on each day there was a collected balance or an uncollected balance, and if amounts were paid against uncollected funds? Did you make such a study?

A. Yes, I did.

Q. And what records did you consult for the purpose?

A. I consulted a photostatic copy of the Lofendo account in East Bakersfield. I checked the record of the United Produce Company ledger sheet in the Merchandise National Bank and the copies of the deposit tickets of the Lofendo account at East Bakersfield.

Mr. Lasky: Will you stipulate, counsel, that the papers which he has consulted are all in evidence?

Mr. Erskine: If you say they are, I will take your word.

Mr. Lasky: You just offered the deposit tags a few moments ago, and the Lofendo sheets and the United Produce are all in, are they not?

Mr. Erskine: According to my understanding they are.

Mr. Lasky: Will you mark this as plaintiff's exhibit next in order?

(Testimony of Frederick C. Messenger.)

The Court: Then this is just a computation from the records that are in evidence? [762]

Mr. Lasky: That is right. That is true of so much of what the defendant has been putting in.

The Court: Yes.

Mr. Lasky: I am only putting this in because of that, and I insist in getting in a similar sheet on the other side also computing from the records.

The Clerk: Plaintiff's Exhibit 33 for identification.

Q. (By Mr. Lasky): Is this result, Plaintiff's Exhibit 33, the result of your study?

A. Yes, it is.

Q. You say that it is correct? A. Yes, sir.

Mr. Lasky: I offer that.

The Clerk: Plaintiff's Exhibit 33 in evidence.

Mr. Erskine: No objection, your Honor, except that it may be that the basis of it is incorrect.

Mr. Lasky: I am through with him.

### Cross-Examination

By Mr. Erskine:

Q. Mr. Messenger, in making the study, how many days did you allow for checks deposited to the account of Lofendo to clear?

A. You are referring to this schedule that we just talked about?

Q. Yes.

A. It is based on the actual payment of the items.

Q. The actual payment as evidenced by the Merchandise ledger [763] account?

(Testimony of Frederick C. Messenger.)

A. That is correct.

Mr. Erskine: That is all.

Mr. Lasky: That is all.

The Court: Very well.

Mr. Lasky: Counsel, I have here a bank examiner's report of the condition of the Merchandise National Bank of Chicago, the examination beginning December 30, 1948, and closing January 12, 1949, covering a period which includes the events of November and October, 1948. Will you stipulate with me that this is a true copy of the report delivered to our bank by the bank examiners?

Mr. Erskine: If you say it is, I will accept your statement.

The Court: Very well.

Mr. Lasky: If the Court please, I wish to offer in evidence the caption thereof and then only a portion of page 8. Here is what I have in mind: the caption identifies the document, and part of page 8 is entitled "Loans Exceeding the Limit Prescribed by Section 5200, Revised Statutes," and so forth, that being the section of the National Bank Act to which the defendant's answer refers. No other part of this bank examiner's report relates to that subject matter, and it contains, of course, confidential information about other customers. So I wish to offer—I have had photostats made of those portions of [764] course. I say to counsel that I will be glad to have the Court, if counsel wishes, examine the rest of it to make sure that I am correct when I

say that no other part bears upon the subject matter.

Mr. Erskine: What part of it discusses the period, Mr. Lasky? The period covered by the report? It says the examination commenced——

Mr. Lasky: It covers the period subsequent to the previous examiner's report, and I have stated to you and asked you to stipulate that the previous examiner's report would be earlier than October, 1948.

Mr. Erskine: You said that it covered a period in October and November, 1948. Where does it say that in the report. This seems to commence——

Mr. Lasky: It doesn't say in the report. The report gives the date of the examination and I state to you as a fact that the previous report occurred——

The Court: Prior to October, 1948.

Mr. Lasky: Prior to October, 1948. Now if we can't stipulate as to that——

Mr. Erskine: This goes back to the preceding report? This picks up the report from the last day of the preceding report.

Mr. Lasky: That is a matter of legal argument, that one report on matters of this kind, picks up where the preceding [765] report left off.

Mr. Erskine: If that is a fact—if you tell me it is the fact I will agree to it.

Mr. Lasky: It is the fact.

Mr. Erskine: I don't know. There is nothing to base any conclusion on.

Mr. Lasky: I assure you that it is a fact.

Mr. Erskine: Well, I suppose that I will take the assurance, your Honor, to facilitate things.

The Court: Very well.

Mr. Lasky: Then I ask that this be marked as plaintiff's exhibit next in order.

Mr. Erskine: I have an objection to it, if the Court please, I object to it on the ground that it is incompetent, irrelevant and immaterial; that it is hearsay; that it is not in any way binding upon the defendant in this case, and that, in a way, it is a self-serving document, self-serving from the point of view of the Merchandise, and also from the point of view of the comptroller's office.

Mr. Lasky: I am certainly prepared to argue the point.

The Court: I am not going to listen to the argument at this point, but cover it in your memorandum when it is filed. Subject to the objection of the defendant, upon which the Court reserves its ruling, the document is received in evidence.

The Clerk: Plaintiff's Exhibit No. 34 in evidence. [766]

Mr. Lasky: Now I ask Mr. Riordan to take the witness stand, with the Court's permission. Mr. Riordan has been of record as counsel.

The Court: What is the purpose?

Mr. Lasky: The purpose is this: Your Honor will note from the last exhibit the statement that the bank examiner should advise the directors of their individual responsibility if there has been any excess loans. Mr. Riordan was a director. I propose to put Mr. Riordan on the stand and ask him the conversation of the bank examiner with the directors on this subject. In other words, it being



part of the examiner's official to make any statement to the directors upon the subjects, I propose that in evidence.

The Court: Just as further cumulative proof?

Mr. Lasky: That is right. The evidence will be that the examiner, after submitting this report, told the directors that he had made a special examination of the United Produce Company and concluded there were no loans in violation of the statute.

The Court: What you have already introduced in evidence purports to show that there were none.

Mr. Lasky: That is right.

The Court: Of course he would not be advising the members of the board to the contrary. That follows. So that doesn't add anything. In other words, if that is admitted in [767] evidence and considered, there being no other attack upon it, it would be there.

Mr. Lasky: That is right. It is testimony that stated a negative, that there was no violation.

The Court: Sure.

Mr. Lasky: Correct.

The Court: If you care to do it, it is all right, but I think it doesn't add anything.

Mr. Lasky: Will you let me consult with Mr. Riordan for a moment?

The Court: Yes.

Mr. Lasky: Very well. I won't put Mr. Riordan on the stand then.

The Court: Very well.

Mr. Lasky: With that, the Plaintiff rests its rebuttal.

There is one more thing I want a stipulation from counsel that all the exhibits on the depositions and the photostats of which accompanied them to the Clerk's office, which have not yet been used by anybody, may now be released into my custody, because I want to complete my own files.

Mr. Erskine: Whatever Mr. Lasky wants is all right.

Mr. Lasky: They are just rubbish so far as the Clerk's record is concerned. They were unused exhibits on the depositions.

The Court: Very well. So ordered. [768]

Mr. Erskine: I have one more thing, and it is something that I myself do not very clearly understand.

Mr. Tobey tells me this: that under the rules of Bank of America, where a check was deposited with the Bakersfield Branch and sent forward with a cash letter, the rules required the bank to allow the check two days to clear if they wanted to avoid paying against the uncollected funds represented by the check. Is that correct, Mr. Tobey?

Mr. Tobey: Yes; that was given in my deposition.

Mr. Erskine: That is correct. Will you so stipulate? Mr. Tobey says that he would testify to that effect.

Mr. Lasky: What Mr. Tobey is saying here is no part of the record.

The Court: Oh, Oh, no, no.

Mr. Erskine: There it is; airmail items two days after mailing.

Mr. Lasky: To where?

Mr. Erskine: To Chicago.

Mr. Lasky: That is airmail.

Mr. Erskine: Airmail.

Mr. Lasky: These items were never sent by airmail.

Mr. Erskine: I think they were, or weren't they?

Mr. Tobey: I understand——

Mr. Lasky: The witness doesn't know. We have never heard of airmail. [769]

Mr. Tobey: They were sent out by airmail, I know that.

Mr. Lasky: This is a form of device which only a banker can understand, and I suggest, whatever it means, you put it in the record, I don't think it means anything.

Mr. Tobey: If you want to put it in the record, that is all I want you to do, so we can argue on it later. Put that in the record.

Mr. Erskine: I don't want to wear out the patience of the Court. Perhaps we had better testify about it.

#### LLOYD TOBEY

recalled on behalf of Defendant in surrebuttal:

Mr. Erskine: Will you mark that for identification?

The Clerk: Defendant's exhibit YY for identification.

Q. (By Mr. Erskine): I show you that exhibit, Defendant's Exhibit YY for identification, and ask

(Testimony of Lloyd Tobey.)

you to state whether or not those are the regulations of the Bank of America which controlled the time allowed checks for deposit to clear when the checks are drawn on Chicago banks? A. Yes.

Mr. Lasky: Just a moment; regulations can't control what happened. It is a regulation of the bank, I assume.

The Court: Yes, that would not be binding on the Merchandise.

Mr. Erskine: No; and it is a leading question.

Q. What is that regulation? [770]

A. This is the transrouting schedule that the Bakersfield branch in November, 1948, and for the month prior thereto handling the Lofendo account and under which it kept track of the amount of outstanding time on the items to Chicago.

Q. On the United Produce Company?

A. On the United Produce Company checks deposited to the Lofendo account.

Q. How much time?

A. Their instructions were that on all uncollected outstanding Chicago items they were to consider the mailing time of two days and that the items could be considered good there from the third day.

Mr. Erskine: That is all.

Mr. Lasky: If Airmail was used?

A. If Airmail was used, and Airmail was used in these cases.

Mr. Lasky: I move to strike out that "Airmail was used in these cases." This witness doesn't know.

(Testimony of Lloyd Tobey.)

The Court: It is obviously hearsay with this witness. It is stricken.

The Witness: Airmail was used.

Mr. Lasky: I move to strike that.

The Court: It is stricken.

Mr. Lasky: That is all.

Mr. Erskine: I will ask that that be admitted in evidence.

The Clerk: Defendant's Exhibit YY in [771] evidence.

### Redirect Examination

By Mr. Erskine:

Q. Do you know anything about the practice of the East Bakersfield Branch with respect to the use of Airmail for the purpose of forwarding checks deposited to the its customers?

A. I know that——

The Court: Just answer the question.

Mr. Erskine: Do you know of your own knowledge?

A. The branch is given instructions——

Mr. Lasky: Answer the question.

The Court: Just answer the question.

A. The schedule provides——

The Court: No, no.

Mr. Erskine: What is the fact?

The Court: We can see what the schedule provides. Do you know?

Mr. Erskine: Do you know the practice of the branch?

(Testimony of Lloyd Tobey.)

A. The practice of the branch is to use Airmail.

Q. Do you know that of your own knowledge?

A. Yes.

Mr. Lasky: Just a moment. Are you through?

Mr. Erskine: I am through.

### Recross-Examination

By Mr. Lasky:

Q. You know that because you have been told?

A. That's right. [772]

Mr. Lasky: I move to strike the answer out as hearsay.

The Court: It may be stricken. It is hearsay.

Mr. Erskine: Do you know whether there are any rules and regulations of the Bank relating to that subject?

The Court: The practice doesn't make any difference, in any event; the particular items are here involved.

Mr. Erskine: That is all, Mr. Tobey.

Mr. Lasky: That is all.

Mr. Erskine: Nothing further from us.

The Court: Very well the evidence is closed on both sides on this point.

Mr. Lasky: Yes.

The Court: And we are going to meet on Thursday afternoon; is that right?

Mr. Erskine: Yes, your Honor, at 3:30.

The Court: At 3:30. I suppose in this Court-room, but we had better check with the Clerk's office on that day.

Mr. Lasky: If the Court please, now that the evidence is closed, I wish to make a motion for leave to amend the complaint to conform to evidence.

I wish to amend the complaint in the following respects:

On page 3, line 7, I wish to change the figure of \$113,216.50 to the figure \$203,047.60; and on page 2, line 22, I wish to increase the figure \$296,451.97 to \$386,283.07; and in the prayer, where we pray judgment for the \$113,216.50 I wish to increase that to \$203,047.60. [773]

The basis of the motion to amend is that we were seeking to recover not merely \$113,216.50, but also the additional sum of \$89,831.10.

The information upon which this motion was made was not in our possession until Mr. Tobey and Mr. Erskine turned over to us so-called secret or confidential information from which we obtained a stipulation just Saturday and that stipulation shows the facts to be as follows, in connection with other evidence in the case: An advice of credit was received by the Defendant bank from the Merchandise National Bank covering the \$89,000 on the 16th after work and was not credited until the 18th, as of the 17th. Meanwhile, on November 17th, Mr. Messenger had telephoned to Mr. Estribo, and he put the Bank of America on notice that a fraud had worked upon us by our customer. He put them on notice that in fact there were several hundred thousand dollars of funds in the red, so



that the \$89,000 was not good. At that time he did not know the advice of credit had not yet been acted upon, so he did not speak of revocation. But under the case of Wiener vs. Root, to which we referred in our preliminary memorandum, if the defendant bank before it applied those funds, received notice it was chargeable with their return. The stipulation that we just entered into on Saturday shows that what happened to the \$89,000 was this: There had been kicking around the branch since the previous Friday, or the 15th of the month, checks for \$75,000, which the branch negligently failed [774] to have charged against the \$97,000 to which they gave credit on the 16th as of the 15th, then it charged against the \$97,000 checks for \$109,000, and then they had no funds available until this advice of credit came, when they seized this \$89,000 to pay the \$75,000 after they had already been put on notice by Mr. Messenger and also by Mr. LeRoy.

In the circumstances and in view of the fact which we just learned on this trial and of which we had no chance to learn before, we will ask leave to amend the complaint and pray for the larger sum.

Of course we don't want to argue the matter now. I am just stating what are the reasons. I think our right is controlled by Rule 15 of the Rules of Civil Procedure, which provides that the Court shall be liberal in permitting amendments after the evidence is all in; the Court should be very liberal in permitting amendments to provide that all matters be considered and disposed.

The Court: Yes.

Mr. Erskine: I, of course, your Honor, object to the granting of any such permission. If they were going to sue us for the additional \$89,000, they should have done so at the time they filed their complaint.

When Mr. Lasky says that he just learned the facts upon which he bases his claim to amend his complaint, he is not, according to my understanding, stating the true situation. He was threatening me with such action when we were back in [775] Chicago.

Now, I do not propose at this time, your Honor, to enter into a discussion of the facts and the law relating to the point. I understand that Mr. Lasky is not asking for a ruling at this time.

The Court: He is asking for a ruling as to whether or not he may amend his complaint.

Mr. Lasky: So before the argument on Thursday I can have it in writing in that form.

Mr. Erskine: I don't believe he should be permitted to amend, your Honor. The claim that they made against us was for \$113,000. That claim is based upon the contention that they had a right to revoke the credit for the six checks. The facts relating to that credit were, as I recall them, were substantially this: The advice of credit was sent out on November 15th. On that day the account of the Bank of America kept by the Merchandise was credited with \$113,000. On that day the account of the United Produce Company was debited with the \$113,000. On that day, or on the next succeeding day, in the regular routine, the checks were

marked "Paid"; but the advice of credit with respect to the six checks stamped "Paid" was mailed on November 15th.

On November 17th, Messenger telephoned to Estribou. In that conversation he told Estribou that the bank had suffered a loss in the United Produce transactions, and he asked him whether or not the advice of credit with respect to the six [776] checks had been received. Estribou replied that that advice of credit had not been received. Then there is a conflict between the two men as to what was said from there on, and into which I will not go. That all relates to the six checks.

Now, what happened to the four checks on the \$89,000? The four checks were sent back by a collection letter. As I recall. My recollection is that the four checks were received at the Merchandise bank either on the 12th or the 13th; I think it was on the 12th. On the 12th they did the same thing with the four checks which I have described with the six. They debited the United Produce Company account, they credited the Bank of America, and they sent out an advice of credit to the effect that the four checks were paid. The advice of credit was received on the 16th. It was not posted on the 16th and it was not posted until the 18th. It was posted on the 18th as of the 17th.

It is true that the Bank of America did not reject the three checks which were deposited with it on the 13th, which was a Saturday. It had to reject them on that day, though otherwise it couldn't re-

ject them; otherwise they had to give the credit. Those checks were drawn by Lofendo in favor of the United Produce Company. They had been deposited in the Merchandise Bank to the credit of the United Produce Company. The charge against that credit had been made. So the United Produce Company got the advantage of those three checks that we did not [777] reject. Now, we could have rejected them, but we did not reject them. It was our intention to reject them, but they were not rejected. We did not to reject, we could give immediate credit.

Then, your Honor, what happened from there on was this: that the \$97,000 was credited to that account. Again checks in favor of United Produce Company, of which the Merchandise Bank got the benefit, were then charged against that credit of \$97,000. Then the advice of credit for the \$89,000 for the four checks came into the bank and three checks which had not been rejected and which had not been charged against any credit were then charged against the \$89,000. That was in the ordinary course of the banking business.

And certainly, certainly those four checks had been paid. They were treated in the same way as the six checks, and thereafter—without regard to that those four checks had certainly been paid.

Now, for the Plaintiff to come in at the eleventh hour and attempt to increase its demand by \$89,000, it seems to me, is not at all justified, and he should not, I respectfully submit, be permitted to file his amended complaint.

Mr. Lasky: Of course at the proper time I am prepared to argue it, but my point now is, that we did not develop the information earlier upon which we now base our claim here because of counsel's refusal to give us the confidential report. [778]

In Chicago counsel himself brought up the question to witnesses, as he did here at the trial: what was the difference in our manner of treating the \$89,000 from the \$113,000, if we had made the error on the one, hadn't we made the error on the other. Of course we had made the error on the other, the \$89,000. Our reply to that was you had already received the advice of credit; there was nothing we could do and at that time I said to counsel, "If there are some concealed facts on this, we may have to amend." Of course I asked him to produce all the details on the \$89,000, when we got back to San Francisco, because he told me he had already given me all the information about what had happened in the Lofendo account, and yet I never got any of that information about the \$89,000 until after some discussion in the courtroom. I finally succeeded in getting the real facts of the matter. I think we should be permitted to amend the complaint. True, your Honor's order permitting the amendment does not mean that your Honor will or will not grant judgment accordingly.

The Court: That is what I was going to say. It seems to me, counsel, you can argue the facts of the matter as to whether Plaintiff is entitled on the facts, to a judgment in the increased amount. That can be argued. All the evidence is in, and surely, if

Plaintiff is entitled to it, he should be permitted to have it. If he is not entitled to it, the evidence is here and it will be decided. [779]

That is the very purpose of the rule.

Mr. Lasky: Yes.

The Court: When these matters are developed during the course of the trial, if an additional claim develops during the course of the evidence, it can be adjudicated.

Of course your argument that you have just made goes to the merit of the claim, not as to whether or not counsel should be permitted to amend and state a claim; but as to whether or not he should recover upon that claim that he speaks of. And I think the Court if there are sufficient facts upon which Plaintiff would be entitled to recover, justice would of course dictate that Plaintiff recover; if there are not, justice will dictate that Plaintiff shall not recover; if the facts are there.

So leave to amend the complaint is granted. Make your arguments, and of course, for my benefit, separate these amounts in your arguments and in your memorandums thoroughly.

Mr. Lasky: Perhaps it might therefore be convenient and facilitate segregation if I should set this up as a second count instead of changing the figures in the first count.

Mr. Erskine: Change the first count, then I won't have to file an amended answer.

Mr. Lasky: All right; I will change them in the first count.



Mr. Erskine: It will be understood that my amended answer, [780] the one already filed——

The Court: Your amended answer will stand to the amended complaint.

Mr. Lasky: So agreed. I will have the written amended complaint in your possession before the argument on Thursday and will have it with the Court by then.

The Court: Very well. I will hear the oral arguments then on Thursday and at the times agreed upon. We will state those on Thursday. I don't recall the times now for the submission of proposed findings of fact and conclusions of law and briefs supporting your positions.

Mr. Lasky: Very well.

The Court: Very well. The Court will stand in recess until 3:30 on Thursday. [781]

Thursday, June 29, 1950, at 3:30 P.M.

The Clerk: Merchandise National Bank vs. Bank of America.

Mr. Erskine: If the Court please, before we proceed with the argument, I would like to make a short motion, and in support of the motion I am going to file this affidavit which I want to deliver to the Court now. It is a motion under Section 63 of the rules to set aside the order granting the plaintiff leave to file an amendment to his complaint.

In this affidavit I have quoted part of LeRoy's deposition in Chicago, and which in the language of the affidavit says that Mr. Lasky stated there that he was seriously considering filing an amendment to



his complaint or a claim for the \$89,000 covered by the amendment which the Court granted him leave to file the other day. [782]

\* \* \*

The Court: Do you have anything to say, Mr. Lasky?

Mr. Lasky: Yes, I will just take a [784] moment.

\* \* \*

As to having been taken by surprise, the rights to the \$89,000 are actually covered by the facts which have been stipulated to. It isn't a question in dispute as to the facts, and counsel hasn't actually been taken by surprise. I place it upon the ground that not until the last day of the trial when we finally got to the stipulation as to what would be shown [785] and demonstrated by virtue of Mr. Tobey's report, did we find any basis upon which we could have sought any such relief.

The Court: Well, what about Mr. Erskine's position with reference to whether or not all of the facts concerning that amount are in evidence, in other words, so that he can assert his defense to that claim?

Mr. Lasky: They are in fact in evidence. If he says he has got some other facts which would bear on that, it might be appropriate for the court to let him introduce them. But what would they be? We know what the time relationships are. We have stipulated to them. We are basing this part of the case on the undisputed evidence on which the witnesses

on both sides agree as to conversations and as to the stipulated facts.

The Court: I am not going to rule upon this matter at this time. I will take your motion under advisement. If, Mr. Lasky, you wish to file with the court in response to the motion any affidavit or otherwise——

Mr. Lasky: Yes, I should be glad to do that. May I do that accompanying our brief in this case?

The Court: Yes.

Of course, in the natural course of events, I will rule upon this before I proceed to a consideration of the facts upon which your amended complaint goes.

Mr. Erskine: May I file a response to Mr. Lasky's [786] affidavit, your Honor?

The Court: Yes.

Mr. Erskine: And I of course am going to read this transcript.

The Court: Yes.

Mr. Erskine: And if I conclude from reading the transcript that any of the facts relating to the \$89,000 are omitted, which I believe they are, and if the Court denies my motion, then I certainly ought to have some opportunity to present those facts.

The Court: In the first place, I think that you should submit to the court an affidavit with reference to the facts that you——

Mr. Lasky: It may well be we could stipulate to the facts and how those are relevant.

The Court: ——with reference to any facts that

you may assert in the event that the motion is decided contrary to your position.

Mr. Erskine: I will do that after I have gone over the record.

The Court: Yes; you can do this in conjunction with your memorandum and briefs on the case as a whole.

Mr. Lasky: Yes.

The Court: And it will be given consideration.

Mr. Lasky: I feel quite confident that it will be discovered [787] that there is nothing or no way in which counsel has been prejudiced.

The Court: Then of course if your motion is denied but there are some facts which the Court might want to hear, it might be that you could stipulate to them. I will keep in touch with you on it. If not, if you can't stipulate to it, it may be that I would have to reopen the matter to that extent at a later time to take that additional evidence if you present by way of affidavit what that evidence will be.

Mr. Lasky: As a matter of fact, in my argument of this afternoon, I propose to touch on the \$89,000 so counsel will be able to perceive now what our theory is and whether there is any evidence that could possibly bear on it that isn't in the record.

May I present the amended complaint for filing?

The Court: Yes, it may be filed.

Mr. Lasky: Shall I proceed, if the court please?

The Court: Yes, you may proceed.

[Endorsed]: Filed August 24, 1950. [788]

